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In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Title X of the Public Health Service Act, which authorizes federal grants to support the provision of family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. The implementing regulations prohibit Title X grant recipients from providing, within their Title X programs, abortions or abortion-related services, including counseling clients about abortion, referring them for abortions, or engaging in abortion-related advocacy. The questions presented are the following:

1. Whether the regulations violate Title X.
2. Whether the regulations violate the Fifth Amendment right of a pregnant woman to terminate her pregnancy.
3. Whether the regulations violate the First Amendment rights of grantees and pregnant women.

PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Dr. Louis Sullivan, Secretary of Health and Human Services. Respondents, plaintiffs-appellees below, are Planned Parenthood Federation of America, Planned Parenthood of the Rocky Mountains, Planned Parenthood Association of Utah, Boulder Valley Women's Health Center, Marilyn Foelski, M.D., Philip Freedman, M.D., and Kirtly Jones, M.D.

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LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of Dr. Louis Sullivan, Secretary of the Department of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 913 F.2d 1492. The decisions of the district court (App., *infra*, 30a-71a) are reported at 680 F. Supp. 1465 (preliminary injunction) and 687 F. Supp. 540 (permanent injunction).

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of relevant constitutional, statutory, and regulatory provisions is reproduced in the appendix to this petition. App., *infra*, 72a-81a.

STATEMENT

1. Title X of the Public Health Service Act[1] authorizes the Secretary of Health and Human Services to make grants nationwide to public and private nonprofit entities to establish "projects"[2] that "shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. 300. Congress provided, however, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. That restriction was intended to ensure that Title X funds would "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activ-

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[1] Title X was added to the Public Health Service Act by the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 6(c), 84 Stat. 1506-1508, 42 U.S.C. 300 to 300a-6.

[2] "Title X project" and "Title X program" are used by the Secretary interchangeably, and can mean either the "program which is approved by the Secretary for support" or the "coherent assembly of plans, activities and supporting resources contained within an administrative framework." 42 C.F.R. 59.2. Moreover, while Title X services may be delivered through a family planning clinic, the Title X project may be only one aspect of that clinic.

ities." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970).

2. The initial implementing regulations required that grantees "not provide abortions as a method of family planning" in Title X programs. 42 C.F.R. 59.5(9) (1972); see 36 Fed. Reg. 18,466 (1971); 45 Fed. Reg. 37,437 (1980). The statute was interpreted, however, to allow grantees to provide "nondirective counseling" about pregnancy termination, including information about and referral for abortions through the provision of the names, addresses, and telephone numbers of abortion providers.

In 1988, in order to bring the Title X programs more in line with the text and purposes of 42 U.S.C. 300a-6, the Secretary adopted new regulations that altered the counseling and referral policy; the regulations also clarified pre-existing limitations on abortion-related advocacy and requirements of physical and financial separation from the performance of abortion-related activities. See 53 Fed. Reg. 2922, 2923-2925 (1988). The new regulations prohibit Title X grantees from engaging in those activities that assist a woman to obtain an abortion, while not interfering with the right to receive information about abortion from sources other than Title X projects. More specifically, the regulations attach three major conditions to the grant of federal funds for Title X projects.

First, a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Title X projects may not counsel their clients about abortion as a family planning method whether such counseling is neutral, favors, or opposes abortion.

Nor may a Title X project assist women in procuring an abortion for family planning purposes by providing them with referrals to entities that provide abortions or abortion-related services as their principal business. 42 C.F.R. 59.8(a)(2) and (3). At the same time, the regulations do not forbid a Title X project from making clear to its clients that the project only provides preventive family planning services and does not assist in procuring abortions and abortion-related services.

Second, the so-called "program-integrity" regulations clarify the required degree of physical and financial separation between Title X projects and the other parts of a grantee's organization that might provide abortion services. The regulations call for a case-by-case determination of "objective integrity and independence" based upon (but not limited to) factors such as (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent. 42 C.F.R. 59.9. There are no other restrictions in that section on the relationship between a grantee's Title X project and its other activities, or on the activities of parent or affiliate organizations.

Third, the regulations codify and clarify the preexisting prohibition on abortion advocacy, and give examples of activities so proscribed, such as lobbying and using legal action to make abortion available as a

method of family planning.[3] The regulations' restrictions concern only abortion as a method of family planning. The regulations require a Title X project to refer a client for necessary treatment in a medical emergency, even when this treatment would normally involve an abortion. See 42 C.F.R. 59.8(a)(2) and (b)(2). But the principal focus of Title X's subsidies is "[f]amily planning," which is defined as "the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved." 42 C.F.R. 59.2. Thus, the medical services that Title X supports also do not include post-pregnancy services, such as prenatal and obstetric care. Accordingly, if a client of a Title X project is diagnosed as pregnant and no medical emergency is present, she must be referred to an entity that will offer prenatal pregnancy care.[4] The regulations do not attempt to con-

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[3] (1) Lobbying for the passage of legislation to increase in any way the availability of abortions as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

42 C.F.R. 59.10(a).

[4] The client must "be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." 42 C.F.R. 59.8(a)(2).

strict the information that a Title X client might receive at a prenatal care facility; the fact that a pregnant woman received counseling about abortion as a method of family planning at the prenatal care facility would not, in itself, violate the regulations. But a Title X project may not employ prenatal care referrals as a means of circumventing Title X's restriction by "weighing the list of referrals in favor of health care providers which perform abortions, by including on the list * * * health care providers whose principal business is the provision of abortions, * * * or by 'steering' clients to providers who offer abortion as a method of family planning." 42 C.F.R. 59.8(a)(3).

Moreover, the new regulations apply only "to the use of Title X project funds." 42 C.F.R. 59.10(a).[5] Any abortion-related services provided or activities engaged in by a grantee or its affiliates outside of its Title X project have no effect on the grantee's Title X funding.

3. After the regulations had been promulgated, but before they had been applied, respondents brought this action in the United States District Court for the District of Colorado, challenging the facial validity

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[5] Title X project funds are defined to include "grant funds, grant-related income or matching funds." 42 C.F.R. 59.2. Grant funds are those provided by the government; matching funds are the funds that must be supplied to the project by the grantee to cover the balance of expenses. Grant-related funds are funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources. The terms of the grant specify how grant-generated income may be used. The Secretary may allow these funds to be applied toward the 10% matching fund requirement; to be, in effect, returned to the government; or to be used to expand the Title X project. See, *e.g.*, 45 C.F.R. 74.42(c)-(e).

of the regulations. The district court issued a preliminary injunction prohibiting the Secretary from enforcing the new regulations, App., *infra*, 30a-62a, which the court made permanent four months later on essentially the same grounds as those given for issuing the preliminary injunction, App., *infra*, 63a-71a. The court held that the Secretary lacked statutory authority to issue the regulations, App., *infra*, 35a-48a, and that the regulations violated the Fifth Amendment "because they impermissibly restrict the flow of information that a woman must have to make an informed decision whether to have an abortion." App., *infra*, 50a. The court also held that the regulations "represent content-based censorship" which impermissibly impedes a physician's First Amendment right to disseminate relevant medical information, as well as a woman's First Amendment right to receive such information. App., *infra*, 57a-59a.

A divided panel of the court of the appeals affirmed. The court—disagreeing with the district court—first held that the Secretary had "sufficiently justified" the new regulations, "and we therefore cannot rule them to be arbitrary and capricious." App., *infra*, 9a. The one exception was the program-integrity regulation, 42 C.F.R. 59.9, which the court found to "violate[] congressional intent." App., *infra*, 10a.

Turning to the constitutional issues, the majority acknowledged that if the regulations required a clinic to say to a pregnant woman, " 'Go away, we only give advice on prepregnancy planning,' then it might be said that the government has done no more than subsidize a permissible activity." App., *infra*, 13a. The majority further noted that "[i]f we could conclude that the pregnant women who are patients of Title X clinics are knowledgeable about their abortion option, or will seek advice from doctors not fet-

tered by the Title X regulations, then we might conclude that *Maher* [v. *Roe*, 432 U.S. 464 (1977)] controls, because poverty alone does not give a woman the right to government-funded benefits." App., *infra*, 15a. The majority, however, concluded that many women would rely on the information provided by grantees, "[a]bsent a warning that the advice given at Title X clinics is incomplete," *ibid.*, and that therefore the regulations constituted impermissible "state intrusion into the advice a woman requests from or is given by her doctor." App., *infra*, 17a. In addition, the majority concluded that the regulations violate the First and Fifth Amendment rights of Title X providers because they "condition receipt of Title X funds upon physicians' promises not to give advice that the standards of their profession require them to give." App., *infra*, 23a.

Judge Baldock dissented.[6] He would have upheld the exclusion of abortion counseling from Title X programs because the regulations "leave[] a pregnant woman with essentially the same choice as if the government had chosen not to provide Title X grants at all." App., *infra*, 26a. He distinguished the precedents relied upon by the majority[7] as involving restrictions directed to all doctors with respect to all pregnant patients, rather than restrictions accompanying a government funding decision with respect to a particular program. App., *infra*, 25a. Judge Baldock also concluded that there was no conflict be-

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[6] Judge Baldock agreed with the majority's conclusion that 42 C.F.R. 59.9 was invalid as contrary to congressional intent. App., *infra*, 24a n.1.

[7] *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

tween the regulations and the First Amendment, because the First Amendment imposes no duty on the government to subsidize the spread of information that it finds to be contrary to the public interest. App., *infra*, 27a. Judge Baldock concluded: "Through the HHS regulations, the government in this instance merely has chosen to encourage childbirth rather than abortion. That policy choice in no way contravenes the Constitution." App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

The majority below decided several questions of considerable public importance in a manner that expressly conflicts with the Second Circuit's decision in *New York* v. *Sullivan*, 889 F.2d 401 (1989), cert. granted *sub nom. Rust* v. *Sullivan*, Nos. 89-1391 and 89-1392 (May 29, 1990) (argued Oct. 30, 1990). The questions presented in this case are identical to the questions presented in the *Rust* case, which is under submission to this Court. The petition in this case should therefore be held and disposed of as appropriate in light of the Court's decision in the *Rust* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's resolution of *Rust* v. *Sullivan*, cert. granted, Nos. 89-1391 and 89-1392 (May 29, 1990) (argued Oct. 30, 1990).

Respectfully submitted.

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DECEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-2251

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD ASSOCIATION OF UTAH, BOULDER VALLEY WOMEN'S HEALTH CENTER, MARILYN FOELSKI, M.D., PHILIP FREEDMAN, M.D., and KIRTLY JONES, M.D., PLAINTIFFS-APPELLEES

v.

LOUIS SULLIVAN, M.D., individually and in his capacity as Secretary of the United States Department of Health and Human Services, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Colorado
(D.C. Civil No. 88-Z-158)

[Filed Sept. 6, 1990]

Before LOGAN, MOORE and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge. This appeal arises out of an action brought by organizations and physicians re-

ceiving funds under Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6, who challenge, on behalf of themselves and their patients, the 1988 amendments to the regulations under which Title X funds are administered. *See* 53 Fed. Reg. 2922, 2943-46 (1988) *codified at* 42 C.F.R. §§ 59.2, 59.5, 59.7-59.10. The new regulations prohibit Title X participants from advising women about abortion as a medical option if birth control devices should fail or if they are already pregnant, and the regulations require physical, financial, and personnel separation of Title X supported facilities from any others that counsel about or perform abortions.

The district court entered a preliminary and then a permanent injunction against implementation of the new regulations. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (preliminary injunction) and 687 F. Supp. 540 (permanent injunction) (D. Colo. 1988). The district court ruled that the regulations violate the intent of Congress as expressed in the statute, informed by its contemporaneous and subsequent legislative history. 680 F. Supp. at 1468-73; 687 F. Supp. at 542. It also held that the regulations violate the constitutional rights of the women patients and their advising physicians. 680 F. Supp. at 1473-78; 687 F. Supp. at 542-44. On appeal the Secretary of Health and Human Services challenges all of these rulings.

Two other federal courts of appeals have faced the precise issues before us. A divided panel of the Second Circuit upheld the 1988 regulations against both statutory and constitutional challenges, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 58 U.S.L.W. 3753 (U.S. May 21, 1990)

(Nos. 89-1391, 89-1392). The First Circuit, en banc with one dissent, struck down the new regulations in their entirety, principally on constitutional grounds. *Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53 (1st Cir. 1990) (en banc). That court concluded that of the 1988 amendments, only 42 C.F.R. § 59.9 was invalid as inconsistent with Congress' intent as expressed in Title X or on other nonconstitutional grounds. But the court held that all of the amendments violated the constitutional rights of women to make informed decisions concerning abortion, and violated the consulting physicians' First Amendment rights to properly advise their patients.

We find ourselves in agreement with the First Circuit's analysis, and we join it in holding the regulations invalid.

I

Congress enacted Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-6, in 1970. The act authorizes the Secretary of Health and Human Services "to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." *Id.* § 300(a). Section 1008 of that act provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6. Grants and contracts under Title X are to be made "in accordance with such regulations as the Secretary may promulgate." *Id.* § 300a-4.

Title X funds have never been permitted to be used either to perform or to subsidize actual abor-

tions. *See* 42 C.F.R. §§ 59.5(a)(5), 59.9 (1986). Almost since its enactment, however, the administrative interpretations permitted, and, since 1981, required Title X projects to provide nondirective counseling and referrals to pregnant women about all legally available medical options, including abortion. 53 Fed. Reg. 2923 (1988). This policy was reversed abruptly in 1988 by the promulgation of the regulations now under attack.

In the new regulations, § 59.2 redefined the term "family planning" to refer solely to preconceptual services, explicitly excluding pregnancy care and abortion. Sections 59.7 and following were rewritten entirely. Section 59.8(a)(1) expressly prohibits Title X projects from providing counseling concerning abortion or referrals for abortion. Section 59.8 (a)(2) states that once a Title X project client is diagnosed as pregnant she "must be referred for appropriate prenatal and/or social services" by giving her a list of providers that promote welfare of mothers and unborn children, and she "must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." She may be referred for emergency care. But § 59(a)(3) says that the project may not use emergency referrals as an "indirect means of encouraging or promoting abortion" by weighing referrals in favor of providers that perform abortions, by including on the list of referrals any providers whose principal business is providing abortions, by excluding providers who do not perform abortions, or by "steering" women to providers who offer abortions. Subsection (4) states that the project can provide the woman with medical information necessary to assess the risks of different

methods of contraception, but cannot include counseling with respect to abortion.

Examples of proper and improper actions by Title X providers are set out in § 59.8(b). A pregnant woman requesting prenatal care must be referred to appropriate providers of prenatal care services. *Id.* § 59.8(b)(1). But a pregnant woman who directly asks for a list of abortion providers may not be given a list that includes any clinic which "principally" provides abortion, or a list that includes hospitals and clinics which provide abortion in addition to prenatal care, unless providers of prenatal care in the area that do not provide or refer for abortions are also included on the list. *Id.* § 59.8(b)(3) & (4). The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request, and apparently must tell one making such an inquiry that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* § 59.8(b)(5).

Section 59.9 states specifically that Title X projects have to be so organized that they are "physically and financially separate" from prohibited abortion activities. This requires that the Title X project must have an "objective integrity and independence from prohibited activities;" mere bookkeeping separation is not sufficient. *Id.* The objective integrity and independence is based on factors that include, but are not limited to, separate accounting records, separate facilities, separate personnel, and absence of material promoting abortion. *Id.*

Section 59.10(a) prohibits "actions to assist women to obtain abortions or increase the availability or accessibility of abortion." Specific examples of prohib-

ited activities include lobbying for legislation increasing the availability of abortions, giving patients brochures advertising an abortion clinic, or making an appointment for a pregnant woman with an abortion clinic.

II

Although the Secretary admits that the 1988 regulations are a result of a shift in political climate and represent a significant departure from the policy of the first seventeen years of Title X grants, *see New York*, 889 F.2d at 418 (Kearse, J., dissenting), he defends the regulations as more consistent with the proper interpretation of Title X than the earlier practice. Thus, we determine first whether the 1988 changes in the regulations are permissible under the statute, apart from their constitutionality.

The words of the statute are paramount, of course, and we must give effect to the "unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Each of the circuit courts that have considered the question have found the language of § 1008 of the Act, 42 U.S.C. § 300a-6, that no funds appropriated "shall be used in programs where abortion is a method of family planning," is not free from ambiguity. These courts then appropriately considered the contemporaneous and subsequent legislative history and past administrative interpretations of the section. *See Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-120 (1980). They found the contemporaneous legislative history ambiguous for the most part, although the First Circuit relied upon it to invalidate the new 42 C.F.R. § 59.9, requiring separation of facilities. *See Massachusetts*, 899 F.2d at 59-60. These decisions also

considered the subsequent legislative history in the context of the long-standing administrative construction. In the end, however, both circuits, except for *Massachusetts*' ruling on § 59.9, held that the changes in the regulations were not beyond the power of the Secretary under the statute.

We agree that the language of 42 U.S.C. § 300a-6 is ambiguous in that it does not resolve the issues presented in the challenged regulations. Moreover, the contemporaneous legislative history does not address whether clinics receiving Title X funds can engage in nondirective counseling including the abortion option and referrals, upon patient request. While there has been some recent erosion of the federal courts' practice of consulting "longstanding and consistent" agency interpretations and some of the other techniques for parsing legislative history that we have used to ascertain whether a statute commands a particular result, the Supreme Court decisions have continued to rely on the "traditional tools of statutory construction" in determining congressional intent on "the precise question at issue," *Chevron*, 467 U.S. at 843 n.9; *see NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987). We have considered all of those traditional tools, but do not discuss them in any detail because we can add little to the *Massachusetts* court's analysis of the statute and the relevant interpretative history.

Like the *Massachusetts* court, we find that the propriety of the regulatory changes is a close question—largely because of many years of consistent administrative interpretation, with six reenactments of parts of Title X, and numerous reappropriations, during which unsuccessful attempts were made at statutory

amendment to change the practice of counseling and referrals for abortion on this highly visible and controversial matter. *See Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983) (agency interpretation of statute confirmed or ratified by subsequent congressional failure to change it). In the end, however, we agree with the *Massachusetts* court that, except for new 42 C.F.R. § 59.9, the amendments are not statutorily impermissible.

Title X clearly directs the Secretary to administer a grant program to promote family planning under a statute that delegates to him some discretion with an admonition not to fund abortions. Supreme Court decisions have held that when the mandate of Congress is ambiguous we must defer to any reasonable interpretation by the agency. *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 58 U.S.L.W. 4407, 4411 (U.S. Apr. 17, 1990) (No. 88-1685); *United Food & Commercial Workers Union*, 484 U.S. at 123; *Chevron*, 467 U.S. at 844. This rule applies even when the agency is changing a prior interpretation. *E.g., Curtin Matheson*, 58 U.S.L.W. at 4411; *Chevron*, 467 U.S. at 864-64; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *American Trucking Ass'ns, Inc. v. Atchison, Topeka & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967). That the interpretation is long-standing is not significant unless we can comfortably conclude that a majority of Congress intended the prior interpretation to be frozen into law, a conclusion we cannot reach here. *See Motor Vehicle Mfrs.*, 463 U.S. at 45.

The Secretary must justify his change of interpretation with "a reasoned analysis," *Motor Vehicle Mfrs.*, 463 U.S. at 42, 57. In a lengthy discussion in

the Federal Register, the Secretary argued that the new regulations are more in keeping with the original intent of the statute, justified by client experience under the prior policy, supported by a shift in attitude against "elimination of unborn children by abortion," 53 Fed. Reg. at 2944, and consistent with a change in policies by a new political administration. Whether or not we personally would approve of these changes, the agency has sufficiently justified them and we therefore cannot rule them to be arbitrary and capricious. *See Chevron*, 467 U.S. at 865.

The one exception is 42 C.F.R. 59.9, which requires an amount of physical, financial, and personnel separation between Title X funded activities and any counseling mentioning abortion that would seem to put out of business many current grantees. All of the Title X grantees must provide at least ten percent nonfederal "matching funds," 42 U.S.C. § 300a-4(a). Most provide significantly more than that; federal funds apparently account for only about fifty percent of the money received by Title X grantees. *Massachusetts*, 899 F.2d at 56. One of the plaintiffs in the case before us is a physician in private practice who handles Title X patients in his office, I R. tab 1 ¶ 10; that doctor performs abortions for private, paying patients, *id.* tab 2, Decl. Sylvia Clark. The new § 59.9 clearly prohibits continued Title X funding to that doctor, despite the fact that he is not providing abortion services for Title X patients. Quite apart from the constitutional problems, we agree with the *Massachusetts* court, 899 F.2d at 59-60, and the district court below, 680 F. Supp. at 1468-69, that new § 59.9 has the effect of restricting the number of permissible grantees beyond the intent of Congress as expressed in 42 U.S.C. §§ 300, 300a

and Title X as a whole. Although it was not enacted as a part of Title X, 42 U.S.C. § 300a-7 lends support to our holding. This provision had its origin as a measure to prevent discrimination against those who will not perform abortions, but clearly states a general nondiscrimination policy applicable to all grants under the Public Health Service Act, of which Title X is a part. That section requires that no personnel decisions be made on the basis of either "reluctance or willingness" to counsel or perform abortions. *Id.* § 300a-7(d). When the antidiscriminatory provisions are considered along with the statements in Title X of an intent to provide a "broad range" of services, 42 U.S.C. § 300(a), taking into account the extent "services are needed locally," *id.* § 300(b), that "priority will be given . . . to furnishing such services to persons from low-income families," *id.* § 300a-4(c)(1), with suitable "informational or educational materials" made available to the targeted population, *id.* § 300a-4(d)(1), we believe it violates congressional intent to deny the issuance of Title X grants solely because the grantee is not sufficiently funded to meet the separation requirements of 42 C.F.R. § 59.9.

III

We turn now to the constitutional issues raised by plaintiffs and passed upon by the district court. The important threshold question is whether the instant situation is controlled by the line of cases commencing with *Maher v. Roe*, 432 U.S. 464 (1977), which hold that a government constitutionally may encourage childbirth over abortion by funding only prenatal and childbirth expenses. The Court found that the carrot of state aid, which might induce an indigent woman to carry to term rather than abort, was not

the equivalent of a state-created obstacle in the woman's path to an abortion. *Id.* at 474, 477 n.10.

In *Harris v. McRae*, 448 U.S. 297 (1980), the Court held that the United States government's refusal to fund an indigent woman's medically necessary abortion, when it would pay the costs of her bearing the child, did not violate her constitutional rights. The Court reasoned that her freedom of choice does not carry with it a constitutional entitlement to the money necessary to avail herself of the full range of protected choices; "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Id.* at 316. A year ago, the Supreme Court upheld, on the same reasoning, the right of a state to prohibit the use of state funds or state facilities to perform abortions; "Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent she chooses to use a physician affiliated with a public hospital." *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989).

Although the instant case bears superficial resemblance to the *Maher* line of decisions—a governmental choice to use its funds to promote childbirth over abortion—there are significant differences which we believe make those cases inapposite. The government, of course, has not gone so far as to socialize medicine and publicly fund all hospitals and physicians, a situation the *Webster* decision said might require a dif-

ferent analysis. 109 S. Ct. at 3052 n.8.[1] But it has set up a funding system by which approximately 4,000 entities, including state governments, have been induced to become Title X grantees by offers of up to ninety percent federal funding. The Secretary has admitted that the projects serve approximately 1,000,000 adolescent women. 53 Fed. Reg. at 2944. The total number of women served is no doubt much greater.

> "It has been said that Title X, as the single largest federally-funded family planning program, serves 4.3 million people: its targeted population consists of an estimated 14.5 million women at risk of unintended pregnancy, including 5 million adolescents between the ages of 15 and 19, and 9.5 million adult women between the ages of 20 and 44, all of whom have an income 150 percent below the poverty level."

New York, 889 F.2d at 415 n.1.

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[1] *Webster* also expressed reservation regarding the constitutionality of a state's denying use of public facilities to doctors who perform abortions for private patients at private facilities. 109 S. Ct. at 3052 n.8. Such a situation is analogous to the regulations before us now, because the regulations deny public funding to grantees who perform or counsel concerning abortions, even for private, non-publicly funded patients. *See* 53 Fed. Reg. 2922 ("[S]ection 1008 [42 U.S.C. § 300a-6)] extends to all activities conducted by the federally funded project, not just the use of federal funds for abortions within the project."); 53 Fed. Reg. 2927 ("The Department's concern is that all funds allocated to the Title X program or project—whether they are direct Title X grant funds, program or grant-related income, or matching [private] fund [sic]—be spent in compliance with Section 1008 and that the program be separate and distinct from prohibited abortion activities.").

The record establishes that many women who visit these Title X providers do so because they suspect they are pregnant; the clinic provides pregnancy testing, and many are indeed found to be pregnant. Had the regulations directed that once pregnancy is established the clinic must say, "Go away, we only give advice on prepregnancy planning," then it might be said the government has done no more than subsidize a permissible activity. The regulations, however, require the clinic to go one step further in its treatment of the patient. When a patient is diagnosed as pregnant she *must* be provided with both referrals to prenatal service providers and with interim information on prenatal care. 42 C.F.R. § 59.8(a)(2). Even if the patient specifically requests information on abortion, the clinic is not permitted to advise her about it. We can summarize this no better than did Judge Kearse in her dissent in *New York*:

> "There can be no doubt that the Secretary intends this regulation to forbid a grantee from informing a pregnant woman of the availability of abortion and even from telling her where she can get abortion-related information. For example, though the regulations permit a grantee to give the woman a list of prenatal-care service providers that might also offer abortions, the list must comply with several requirements. It *must* include any available prenatal-care providers that *do not* perform abortions; it *cannot* include providers that offer abortions as their 'principal business'; and it cannot 'weigh[]' in favor of abortion providers. 42 C.F.R. § 59.8(a)(3). The grantee is not allowed to inform the woman which providers on the list, in addition to offering prenatal care, also perform abortions.

Rather, care providers that also perform abortions may be included only if '*the referral is specifically* made to the providers of *prenatal* care services.' 53 Fed. Reg. 2922, 2938 (1988). Indeed, the grantee is required to inform the client about care to preserve the unborn fetus. Section 59.8(a)(2), for example, provides that 'once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services *by furnishing a list of available providers that promote the welfare of mother and unborn child.*'

. . . In addition to the regulations discussed above, for example, § 59.8(b)(4) provides that when a woman asks for a list of abortion providers, the grantee is not permitted to give her a list that includes entities whose principal business is abortion, or a list that does not include 'providers of prenatal care in the area which *do not* provide or refer for abortions.' In contrast, § 59.8(b)(5) provides that when a woman asks for information on abortion, the grantee is permitted to 'tell[] her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion'; it is permitted to 'tell[] the client that the project can help her to obtain prenatal care and necessary social services, and provide[] her with a list of such providers from which the client may choose.'

Thus, the express prescriptions and proscriptions in the regulations require the grantee to emphasize prenatal care and prohibit it from identifying any entity as a provider of abortions. Plainly, the regulations facially discriminate on

> the basis of viewpoint and control the content of the grantee's permitted speech."

889 F.2d at 415-16 (emphasis in original).

If we could conclude that the pregnant women who are patients of Title X clinics are knowledgeable about their abortion option, or will seek advice from doctors not fettered by the Title X regulations, then we might conclude that *Maher* controls, because poverty alone does not give a woman the right to government-funded benefits. But it seems clear that government funding, which fuels virtually all "birth control" clinics in the nation, lures poverty-level women to these clinics for pregnancy testing, medical advice, and referrals to other health care providers. The promise of the clinics, and their goal under law, is to provide "comprehensive voluntary family planning services" upon request. H.R. Rep. No. 572, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5075. Fees for the services are determined on a sliding scale, based on the woman's income. Absent a warning that the advice given at Title X clinics is incomplete, many patients no doubt will rely, without obtaining a second opinion, on the advice given them. At least many of the poorest, most naive and ignorant women—who are the persons targeted by Title X—will rely on that information.[2] Thus, by denying Title X providers

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[2] Of course, the Secretary is in fact anticipating that women will rely on the information provided and will not therefore either need or desire abortions. *See* 42 C.F.R. § 59.2 ("[A]bortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion."); 42 C.F.R. § 59.8(b)(5) (example of pregnant woman who requests information on abortion providers and

the right to mention abortion, to refer to abortion as an option, or to provide professional referrals to others whom they know will counsel about all medical options that are legal, including abortion, the government has placed a state-created "obstacle in the path of a woman's exercise of her freedom of choice." *Harris*, 448 U.S. at 316.[3]

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is given only prenatal care referrals). Information and referrals are an integral part of the services envisioned in the regulations. 53 Fed. Reg. 2923.

[3] We will not assume, as the government apparently does, Appellant's Brief at 44 n.38, that the effect of the Title X provider's failure to mention abortion is mitigated or eliminated by a woman's access to abortion information from other sources. In fact, a provider's failure to mention abortion as a legal option, in the context of an otherwise neutral medical consulation, could well cause the woman to conclude that abortion is not a legal or medical option for her under the circumstances. Many states have recently undertaken measures to modify their abortion laws, which efforts receive extensive media attention. *See* "States Testing the Limits on Abortion," *N.Y. Times*, April 2, 1990, at A14, col. 4 (citing 100 then-pending abortion bills; fourteen floor votes on abortion bills since *Webster*). One reason women might seek information about their medical options at a family planning clinic is the confusion that arises from the barrage of bills introduced, passed, vetoed, or stayed by judicial action. *See, e.g., id.* (Guam, Pennsylvania, and South Carolina laws restricting access to abortion stayed in court actions; Idaho bill restricting abortion passed by legislature but vetoed by governor); "Maryland Legislature Halts an Abortion Move," *id.*, March 24, 1990, at A7, col. 1 (Maryland legislature rejects public referendum to decide which of two conflicting abortion bills becomes law). The two decisions issued at the end of the most recent Supreme Court term, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (upholding parental notification statutes), are unlikely to reduce the legislative activity or women's confusion about their medical options.

We must examine whether that obstacle, the government's provision of intentionally incomplete information, violates any constitutional right previously recognized by the Supreme Court. Of course, under current law a pregnant woman in the first stages of pregnancy has a federal constitutional right to an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). Even if *Roe* is overruled, it means only that the existence of the right to an abortion is left to the political process, probably to the states. No doubt some states would continue to permit abortions, and a pregnant woman in a state forbidding abortions, by virtue of her right of travel to another state, in theory at least still would be able to secure a legal abortion. Thus abortion is currently a legally permissible option for a woman in the early stages of pregnancy, and it will likely remain so.

Because patients at a Title X clinic are invited to consult its physicians and are given intentionally incomplete medical advice, which they reasonably can be expected to follow, we think this case falls squarely within the prohibition in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), against state intrusion into the advice a woman requests from or is given by her doctor. However *Webster, Hodgson v. Minnesota*, 110 S. Ct. 2296 (1990), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), may have affected aspects of the *Thornburgh* and *Akron* decisions, we see nothing to diminish *Akron*'s holding that

> "because abortion is a medical procedure, . . . the full vindication of the woman's fundamental right necessarily requires that her physician be

> given 'the room he needs to make his best medical judgment.' The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing this decision should she choose abortion."

462 U.S. at 427 (citations omitted).[4] Stating that "it remains primarily the responsibility of the physician that appropriate information is conveyed to his patient," the Court struck down government-imposed abortion regulations "designed to influence the woman's informed choice between abortion or childbirth." *Id.* at 443-44. "The State's intent is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person." *Id.* at 448.

These principles were reaffirmed in *Thornburgh*, 476 U.S. at 760, 762. Indeed, *Thornburgh* condemned state rules that structured and slanted the dialogue between the physician and the pregnant patient in language that seems precisely applicable to the situation at bar:

> "Forcing the physician or counselor to present the materials [discouraging abortion] and the list [including agencies offering alternatives to abortion] to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the wo-

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[4] The Supreme Court's recent *Ohio* opinion, while approving a state requirement that a physician inform one parent when a minor patient is considering abortion, continues to recognize the importance of the advice of a detached physician with full information. *Ohio*, 110 S. Ct. at 2983.

> man, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician."

476 U.S. at 763 (citation omitted).

Again, we cannot improve upon the following statement in Judge Kearse's dissent in *New York* concerning the effect on the woman's constitutional rights:

> "The regulations at issue here prohibit the physician in a Title X facility from communicating to his patient frank and complete advice if it involves consideration of abortion. They require him, in referring his patient to other health-care providers, to identify only prenatal-care facilities. If his pregnant patient raises the subject of abortion, he is required to tell her that he cannot give her any advice or counseling on the subject. If she asks where she can get information, the regulations prohibit even an informative response.
>
> . . .
>
> Unlike the regulatory schemes in such cases as *Harris* . . . and *Maher* . . . in which the regulating authority was found merely to have refused to extend an affirmative benefit to women who freely chose abortion, but not to have placed obstacles in the way of an informed choice, the Secretary's regulations here plainly interfere with the pregnant woman's freedom to decide which course of action she prefers. In some cases, the information ban will delay the appropriate education of the patient to such an extent that she is denied any genuine choice. In some

> cases, the patient will never be fully informed, for as the Secretary has acknowledged, '[f]or many clients, family planning programs are their only continuing source of health information and medical care.' U.S. Dep't of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981). These regulations prevent such a program from giving the client any substantive information regarding abortion as an option; if she asks where she may obtain such information, her Title X physician is prohibited from telling her.
>
> By prohibiting the delivery of abortion information and prohibiting communication even as to where such information can be obtained, the present regulations deny a woman her constitutionally protected right to choose. She cannot make an informed choice between two options when she cannot obtain information as to one of them."

889 F.2d 416-17.

Although the matter has received little separate attention in court opinions to this point, the limitations placed on Title X physicians in communicating with their patients, and the referral obligations imposed upon them, violate the constitutional rights of the physicians themselves. The dearth of attention may be because the physicians' rights are considered derivative from the rights of the patient. *See Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977); *Harris*, 448 U.S. at 318 n.21. In the context of a right to advice in the confidential physician-patient relationship, physicians' rights would seem to be entirely coextensive with those of their patients, and if the

patient's constitutional rights are violated so are the physician's. Nevertheless, a separate discussion of the physicians' position illuminates their predicament under the 1988 regulations and strengthens our belief that the new regulations must fail.

Physicians, of course, need not accept employment with grantees of Title X funds if they do not wish to abide by the limitations upon the advice they may give patients; presumably physicians already working for such organizations may quit if they do not like the regulations, although breaking contracts of employment might render them liable for damages. Even so, it is a well-established principle that, although the government has no responsibility to provide funds for a program, it may not condition participation in a program it does fund upon a waiver of constitutional rights. This is set forth clearly in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), as follows:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."

This principle applies fully to employment situations. Individuals may not be required to abandon their constitutional rights to free speech or due process to obtain employment. *Id.* at 597.

The canons of ethics of the medical profession require physicians to give patients advice that includes

abortion as an alternative to carrying a pregnancy to term when the patient's health condition warrants.[6] The health hazards of abortion in a particular instance may be less than the health hazards of carrying the pregnancy to term. One study comparing mortality statistics from abortion and childbirth concluded that "[i]n terms of dying, abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth*, 248 J. Am. Med. A. 192, 196 (July 9, 1982).

The amended regulations, particularly 42 C.F.R. §§ 59.8(a)(1) & (4) and 59.10(a), appear to prohibit physicians paid with Title X funds from advising women about the alternative of abortion even when carrying the baby to full term would involve grave risks for the mother. The regulations, particularly § 59.8(a)(2), appear to require Title X physicians to provide pregnant patients with literature

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[6] The American Medical Association Standards regarding informed consent state that physicians may refer patients to "any other provider of health care services permitted by law to furnish such services, whenever he believes that this may benefit the patient." *Current Opin. of Council on Ethical & Judicial Affairs of the American Medical Association—1986*, ¶ 304; *see also id.* ¶ 807 ("physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice"); American College of Obstetricians & Gynecologists (ACOG), *Standards for Obstetric-Gynecologic Services* 57 (1985) (in event of unwanted pregnancy the physician should counsel patient of abortion option); ACOG, *Statement of Policy: Further Ethical Considerations in Induced Abortion* (Dec. 1977) ("Counseling directed solely toward either promoting or preventing abortion does not sufficiently reflect the full nature of the problem or the range of options to which the patient is entitled.").

from health care providers who will not perform abortions or counsel abortion as an option, and to forbid those physicians from referring pregnant patients to health care providers who will provide such services. In complying with the regulations, in theory at least, the physician risks censure and loss of his right to practice because of his failure to give impartial and full advice.

To condition receipt of Title X funds upon physicians' promises not to give advice that the standards of their profession require them to give implicates the physicians' First and Fifth Amendment rights. *See, e.g., Thornburgh*, 476 U.S. at 763; *Akron*, 462 U.S. at 445; *Frieman v. Ashcroft*, 584 F.2d 247, 251-52 (8th Cir. 1978); *aff'd mem.*, 440 U.S. 941 (1979). This conclusion also does not depend on the continued efficacy of *Roe v. Wade* because, for the reasons already stated, for most women abortion would continue to be a legal alternative that physicians must be free to discuss with their patients.

For the reasons stated, we hold that the regulations violate the Title X providers' and women patients' First and Fifth Amendment rights. We AFFIRM the permanent injunction issued against the implementation of the challenged amendments to the regulations.

BALDOCK, Circuit Judge, dissenting in part.

With the apparent exception of the separation requirements contained in 42 C.F.R. § 59.9,[1] the court today holds unconstitutional the 1988 amendments to the HHS regulations, 42 C.F.R. §§ 59.1-59.17, designed to implement the purpose of Section 1008 of Title X of the Public Health Services Act, 42 U.S.C. § 300a-6. According to the court, the limitations placed upon Title X recipients by the regulations, namely § 59.8, facially violate a pregnant woman's fifth amendment right to choose abortion and her physician's first amendment right to speak frankly about abortion. Because Supreme Court precedent dictates a contrary result, I dissent.

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[1] In part II of its opinion, the court holds § 59.9 invalid as contrary to Congressional intent. Court's Opinion at 12-13. I agree. The aim of Title X is to increase and improve family planning services to indigents in cooperation with existing state and private programs. In enacting Title X, Congress did not intend "to restrict the types of projects with which a Title X recipient could associate, or to place limitations on the physical proximity or the sharing of personnel between Title X projects and unrelated programs which may provide abortion services." *Commonwealth of Mass. v. Bowen*, 679 F. Supp. 137, 143 (D. Mass. 1988), *aff'd*, 899 F.2d 53 (1st Cir. 1990), *cert. pending*, No. 89-1929 (June 8, 1990). Because I concur fully in the court's statutory resolution of the challenged regulations, neither I nor the court have occasion to address § 59.9's constitutionality. *See Harris v. McRae*, 448 U.S. 297, 306-07 (1980) (where case may be decided on either statutory or constitutional basis, court should decide case on statutory basis and avoid constitutional adjudication). Since the court, however, assumes the severability of § 59.9 from the remaining regulations, the constitutionality of those regulations is at issue. *See Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (statutory severability).

I.

The court reasons that *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), control the outcome of this case. Court's Opinion at 20. In those cases, however, the Supreme Court struck down "informed consent" laws that required *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating abortion with a litany of information, regardless of whether the patient sought the information or her doctor thought the information necessary to the patient's decision to abort. *Thornburgh* and *Akron* had nothing to do with a governmental decision to encourage childbirth and discourage abortion through the funding of services relating to the former and not the latter.

The possibility that the HHS regulations will discourage some women from having an abortion is hardly sufficient to invalidate those regulations on their face.[2] *See Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting). *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), all support the view that the allocation of government monies to encourage childbirth over abortion does not unduly burden a woman's right to seek an abortion or place a governmental obstacle

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[2] A facial challenge to the regulations is a most difficult challenge since the challenger must establish that the regulations would be invalid under all circumstances. That the regulations might operate unconstitutionally under some scenario is insufficient to render the regulations invalid on their face. *Webster v. Reproductive Health Servs*, 109 S. Ct. 3040, 3060 (1990) (O'Connor, J., concurring).

in the path of a woman choosing to have an abortion. Yet this court rejects this line of decisions as bearing only a "superficial resemblance" to the instant case. Court's Opinion at 14.

Roe v. Wade, 410 U.S. 113 (1973), imposes "*no* limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474 (emphasis added). Section 59.8's restrictions on abortion counseling and referrals for Title X recipients leaves a pregnant woman with essentially the same choice as if the government had chosen not to provide Title X grants at all. Admittedly, this analysis might differ if the government had socialized medicine, *see Webster*, 109 S. Ct. at 3052 n.8, but the government has not. At this point, the regulations interfere with a woman's ability to obtain an abortion only if she seeks an abortion with the assistance of Title X funds. *See id.* at 3052. The inability of an indigent woman to obtain an abortion would be no less in the absence of Title X. *See Harris*, 448 U.S. at 316. Accordingly, the HHS regulations do not infringe upon a woman's right to abortion.

II.

The regulations, however, undoubtedly infringe upon the doctor-patient relationship by limiting the free flow of information from the doctor to the patient regarding abortion services. As Judge Cardamone stated: "[A] Title X physician's hands are tied with respect to the response he or she may give to a patient seeking abortion information. . . . [The regulations] constitute[] a trap for the mostly unsophisticated and unwary patients, and jeopardizes the ability of Title X physicians to safeguard the

health of those people seeking their expert advice." *State of New York v. Sullivan*, 889 F.2d 401, 415 (2d Cir. 1989) (Cardomone, J., concurring), *cert. granted*, 110 S. Ct. 2559 (1990).

A physician certainly has a common law duty to discuss matters openly and frankly with the patient. *See Smith v. Cote*, 513 A.2d 341, 355 (N.H. 1986) (Souter, J., concurring) (physician's timely disclosure of professional limits based on moral scruples combined with timely referral to physician not so constrained may be sufficient defense in action for failure to advise). Yet the Constitution provides little protection for the "dialogue" a physician undertakes in the course of treating a patient. *Thornburgh*, 476 U.S. at 802 (White, J., dissenting). Regulation of the professions is a matter within the competence of lawmakers, not federal courts. *Id.* at 802-803 (Constitution is "largely unconcerned" with substantive aspect of professional regulation). Because the HHS regulations are rationally related to the governmental interest in "protecting potential life," they in no way infringe upon a physician's constitutional rights. *See Akron*, 462 U.S. at 466 (O'Connor, J., dissenting).

The first amendment does not require the government to subsidize the spread of information which as a matter of public policy the government finds repugnant. *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983). *Perry v. Sinderman*, 408 U.S. 593 (1972), cited by the court to support its holding that the regulations violate a physician's first amendment rights, is not to the contrary. Court's Opinion at 23. In *Perry*, a state supported employer refused to extend the contract of its employee because the employee had exercised his first amendment rights

outside the scope of his employment. Nothing in Title X prohibits recipients from saying about abortion whatever they desire outside of Title X services. *State of New York*, 889 F.2d at 412-13. Moreover, in *Perry*, the employer's purpose in suppressing the speech was *not* to avoid subsidizing the speech, but rather to punish the employee for political activity. *See FCC v. League of Women Voters*, 468 U.S. 402, 408 (1984) (Rehnquist, J., dissenting).[3] Unlike this case, the state action in *Perry* was unrelated to any legitimate governmental objective. Through the HHS regulations, the government in this instance merely has chosen to encourage childbirth rather than abortion. That policy choice in no way contravenes the Constitution.[4]

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[3] In *League of Women Voters*, the Court by a five to four vote held unconstitutional a congressional ban on editorializing by noncommercial educational television and radio stations where federal funding constituted only 1% of the stations' overall income. In contrast, federal funds account for 50% of the monies received by Title X recipients. Court's Opinion at 12.

[4] In *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) and *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947), the Supreme Court rejected the notion that Section 12(a) of the Hatch Act was unconstitutional because of its interference with an employee's freedom of expression in political matters. In his dissent in *League of Women Voters*, Justice Rehnquist cogently noted:

> Section 12(a) of the Hatch Act totally prohibits any local or state employee who is employed in any activity which receives partial or total financing from the United States from taking part in any political activity. One might just as readily denounce such congressional action as prohibiting employees of a state or local government receiving even a minor fraction of that government's income from

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federal assistance from exercising their First Amendment right to speak.

468 U.S. at 406 (Rehnquist, J., dissenting). Of course, political association constitutes the "core of those activities protected by the first amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). But the first amendment does not prohibit government from regulating the public political activity of those even partially dependent on its monetary benefits. How then, can the first amendment be read to prohibit a restriction on the dialogue between a physician and patient, when the physician and patient rely on federal funding to carry on such diaglogue?

APPENDIX B

UNITED STATES DISTRICT COURT
COLORADO

Civ. A. No. 88-Z-158

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD ASSOCIATION OF UTAH, BOULDER VALLEY WOMEN'S HEALTH CENTER, MARILYN FOELSKI, M.D., PHILIP FREEDMAN, M.D., and KIRTLY JONES, M.D., PLAINTIFFS

v.

OTIS BOWEN, M.D., individually and in his capacity as Secretary of the United States Department of Health and Human Services, DEFENDANT

Feb. 25, 1988

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

WEINSHIENK, District Judge.

The matter is before the Court on plaintiffs' Motion For Preliminary Injunction pursuant to Fed.R. Civ.P. 65. The action arises out of defendant's recent promulgation of regulations governing the acti-

vities of entities receiving funds for family planning services under Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-6a. In their complaint and motion for preliminary injunctive relief, plaintiffs contend that the regulations in question are invalid because they exceed statutory authority, are arbitrary and capricious, and are unconstitutional. For the reasons stated below, the Court is satisfied that plaintiffs have a substantial likelihood of success on the merits and have shown irreparable injury. Based on these and other findings, the Court concludes that a Preliminary Injunction is appropriate, which will delay the effective date of the regulations until the Court conducts a hearing on the merits.

Congress passed Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-6a, in 1970. Section 1008 of Title X, which forms the basis of the present controversy, provides: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (1970) (hereinafter "§ 1008"). Initially, defendant interpreted § 1008 through a series of legal opinions issued by its Office of General Counsel (OGC). Thereafter, in 1976 and 1981, defendant issued Program Guidelines for Title X projects. These opinions and guidelines are discussed in greater detail below. On February 2, 1988, defendant promulgated the final regulations relating to compliance with § 1008 which form the basis of the present controversy. 53 Fed. Reg. 2922-2946 (Feb. 2 1988).[1]

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[1] The regulations in question provide:

§ 59.7 Standards of compliance with prohibition on abortion.

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary

Standard For Issuance Of A Preliminary Injunction

In order for the Court to issue a preliminary injunction, plaintiffs must satisfy the four elements set

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that it does not include abortion as a method of family planning. Such assurance must include, at a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

53 Fed. Reg. 2944-45 (Feb. 2, 1988) (to be codified at 42 C.F.R. 59.7 (1988) [)].

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a) (1) a Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral pro-

forth in *Lundgrin v. Claytor*, 619 F.2d 61 (10th Cir. 1980). Specifically, plaintiffs must establish that (1) there is a substantial likelihood that they will eventually prevail on the merits; (2) they will suffer

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viders health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

53 Fed. Reg. 2945 (Feb. 2, 1988) (to be codified at 42 C.F.R. § 59.8 (1988)) (examples omitted).

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in

irreparable injury unless the Court issues the injunction; (3) their threatened injury outweighs whatever damage the proposed injunction may cause defendant; and (4) the injunction, if issued, would not be adverse to the public interest. *Id.* at 63.

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which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

53 Fed. Reg. 2945 (Feb. 2, 1988) (to be codified at 42 C.F.R. § 59.9 (1988)).

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning;

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

53 Fed. Reg. 2945 (Feb. 2, 1988) (to be codified at 42 C.F.R. § 59.10 (1988)) (examples omitted).

Substantial Likelihood of Success on the Merits

Plaintiffs must demonstrate *inter alia* a substantial likelihood of success on the merits before the Court can issue a preliminary injunction. To satisfy their burden in this regard, plaintiffs advance three separate theories to support their contention that the regulations in question are invalid. First, plaintiffs argue that Title X and, specifically, § 1008 do not authorize said regulations. Second, plaintiffs contend that the regulations violate the Administrative Procedure Act, 5 U.S.C. § 706 (1977), because they are arbitrary and capricious. Finally, plaintiffs assert that the regulations are unconstitutional. For reasons stated herein, the Court finds that neither Title X nor § 1008 in particular authorize the regulations at issue, so that plaintiffs have established a substantial likelihood of success on the merits. Accordingly, the Court need not address plaintiffs' second and third theories stated above in resolving this first element of the *Lundgrin* test.

Regarding the question of whether defendant lacked or exceeded its statutory authority in enacting the regulations in question, the precise issue is whether Title X and, in particular, § 1008 authorize said regulations.[2] The Court is the "final authority on issues of statutory construction and must reject

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[2] In its brief, defendant erroneously argues that the question presented is whether Title X *requires* abortion counseling and referral. Defendant's Opposition To Plaintiffs' Motion For Preliminary Injunction at 22, 27. The question of whether § 1008 requires abortion counseling and referral is distinct from the question in this case of whether § 1008 permits defendant to enact regulations which prohibit so-called "non-directive options counseling" as well as referrals to facilities which provide abortions. It appears to this Court that neither Title X nor § 1008 *requires* abortion counseling.

administrative constructions which are contrary to clear Congressional intent." *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 2781 n. 9, 81 L.Ed.2d 694 (1984). Upon careful review of the totality of the circumstances surrounding Congressional enactment of Title X and § 1008, as well as its relevant subsequent history, the Court is convinced that Congress did not authorize defendant to enact regulations which restrict a woman's access to information about abortion.

Analyzing the "totality of the circumstances" does not mean merely looking at an isolated quote from one member of Congress. As the Supreme Court stated in *Consumer Products Safety Commission v. GTE Sylvania*, "the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history, . . . [and] we do not think that . . . an isolated remark [of a Congressman] . . . is entitled to much weight." 447 U.S. 102, 118, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980). Accordingly, the Court does not accord much weight to the 1970 statements of Congressman John Dingell, a sponsor of Title X, which defendant cites in both its brief and in the comments accompanying the regulations to support its contention that § 1008 authorizes the regulations at issue. *See* 53 Fed.Reg. 2922-23 (Feb. 2, 1988), *quoting* 116 Cong. Rec. 37375 (1970). Similarly, the Court does not give much weight to Congressman Dingell's October 14, 1987 letter to defendant, cited by plaintiffs, in which Congressman Dingell attempts to explain his 1970 statement and clarify his understanding of Congressional intent in enacting Title X. Letter from the Hon. John D. Dingell to the Hon. Otis R. Bowen

(October 14, 1987), *reprinted in* Plaintiffs' Brief, Appendix at A-1.

The totality of the circumstances which a Court must review to determine whether a statute authorizes questioned regulations consists of the following elements: (1) the language of the statute itself; (2) its contemporaneous legislative history; (3) early and subsequent constructions of the statute by the relevant agency, and (4) relevant subsequent legislation which sheds light on Congressional purpose in enacting the statute. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108-120, 100 S.Ct. 2051, 2056-62, 64 L.Ed.2d 766 (1980).

Although the starting point of the Court's analysis, the language of § 1008 itself is not particularly helpful in determining whether § 1008 authorizes the regulations in question. The statute makes no reference to prohibiting either the neutral dissemination of information about abortion or referrals upon request to entities which provide abortions. As a result, the Court must look beyond the language of § 1008 to determine the scope of defendant's statutory authority.

In reviewing the contemporaneous legislative history of Title X, two central themes emerge regarding Congressional intent. First, the contemporaneous legislative history is replete with references to the fact that Congress intended it to be a "comprehensive" program "flexible" in its design. *See e.g.* 1970 U.S.Code Cong. and Admin. News pp. 5068, 5073-74; 116 Cong.Rec. 24094-96 (1970). In addition, the Congressional Declaration of Purpose which accompanies Title X spells out its comprehensive scope. *See* 42 U.S.C. § 300, Congressional Declaration of Purpose. Also, the Committee Report supporting Title X states that among the components of a suc-

cessful family planning program are: "(1) Medical services, including consultation, examination, prescription, and *continuing supervision* . . . and *referral to other medical services as needed.* (2) *Outreach/following* system, including patient identification, contact, recruitment, appointment support, followup, and continuing education. . . ." Senate Comm. On Labor And Public Welfare, Title X of the Public Health Service Act of 1970, S.Rep. No. 91-1004, 91st Cong., 2nd Sess., *reprinted in* 116 Cong.Rec. 24096 (1970) (emphasis added), 1970 U.S.Code Cong. and Admin.News p. 5068. The weight of the evidence is that Congress intended Title X to be a broad-based program, designed to accomplish more than simply distribute contraceptives. Admittedly, Congress did not intend for Title X to be a panacea for the entire array of women's health problems; however, Congress certainly intended it to have a broader scope than defendant's interpretation suggests. The regulations simply do not accord with Congress' broad understanding of the breadth of Title X.

The second central theme which emerges from the Court's analysis of the contemporaneous legislative history is that Congress designed Title X to combat the problem of access to family planning services for women with low incomes. The legislative history contains several references to the need to eliminate the then emerging two-tier system of delivery of family planning services by ensuring that no woman is "denied access to family planning assistance because of her economic condition." 1970 U.S.Code Cong. & Admin.News pp. 5068, 5073; *see also* 116 Cong.Rec. 24091-92 (1970). The proposed regulations contravene this legislative purpose by recreat-

ing a two-tier system of delivery of family planning services. Women who can afford to pay for family planning services will receive full information, while those low income women who must go to Title X clinics for family planning assistance receive limited information.

Defendant argues that Congress could not have meant § 1008 to permit so-called "nondirective options counseling" because abortion was a criminal act in a majority of states in 1970. As a result, according to defendant, construing § 1008 to permit such counseling ascribes to Congress an intent to permit federal grantees to engage in activities which violated the criminal laws of a majority of states. This argument is unpersuasive for several reasons. First, under the Supremacy Clause, federal law may touch on the question of abortion counseling, notwithstanding state criminal laws prohibiting abortions. Second, state criminal laws prohibiting abortions did not proscribe the mere dissemination of information about abortions. Finally, close analysis of the legislative history indicates that Congress in fact discussed the efficacy and legality of state criminal laws banning abortion, and there was in fact some support in Congress, albeit not majority support, for the legalization of abortion. *See* 116 Cong.Rec. 24097-101 (1970). Thus, although abortion was a criminal act in a majority of states in 1970, the support in Congress for the legalization of abortion is evidence that Congress in enacting Title X was not particularly concerned about the fact that abortion was a criminal offense in a majority of states.

A reviewing court "should respect an agency's contemporaneous construction of its founding statute. . . ." *EEOC v. Associated Dry Goods Corp.*, 449 U.S.

590, 600 n. 17, 101 S.Ct. 817, 823, 66 L.Ed.2d 762 (1981) (hereinafter *Associated Dry Goods*), *citing Power Reactor Development Company v. International Union of Electrical, Radio And Machine Workers*, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961). "Moreover, such a contemporaneous construction deserves *special deference* when it has remained consistent over a long period of time." *Associated Dry Goods*, 449 U.S. at 600 n. 17, 101 S.Ct. at 823 n. 17, *citing Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed. 2d 415 (1972) (emphasis supplied). Careful analysis of the history of defendant's administrative interpretations of Title X provides further support for the Court's conclusion that § 1008 does not authorize the regulations in question.

Defendant's [3] initial interpretations of § 1008 primarily did not take the form of formal regulations.[4]

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[3] At the time of these initial interpretations, defendant was known as Department of Health, Education, and Welfare (HEW). Allusions throughout this ruling to "defendant" refer to HEW or its successor, Department of Health and Human Services.

[4] In 1971, defendant did promulgate formal regulations under Title X, however. 42 C.F.R. §§ 59.1-59.16 (1971), *reprinted in* 36 Fed. Reg. 18466-468 (Sept. 15, 1971). In particular, 42 C.F.R. § 59.5, originally entitled "Project requirements," provided in pertinent part:

> An approvable [project] application must contain . . .
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> (a) Assurance that . . .
>
> (9) The project will not provide abortions as a method of family planning.
>
> (d) Provision for medical services related to family planning including physician's consultation, examination, prescription, continuing supervision, laboratory exami-

Rather, defendant initially interpreted § 1008 through a series of legal opinions issued by its Office of General Counsel (OGC). Defendant's contemporaneous interpretations of § 1008 permitted entities receiving Title X funds to provide neutral information to women regarding abortion in a counseling context, as long as the activity "did not have the immediate effect of promoting abortions or . . . the principal purpose or effect of promoting abortion. . . ." 53 Fed. Reg. 2923 (Feb. 2, 1988).

In January 1976, defendant issued Program Guidelines for Title X projects which, while not expressly incorporating the language of prior OGC legal opinions, stated that a Title X clinic should ". . . give pregnancy counseling [to patients], when appropriate, [and] make appropriate referrals for any needed services not furnished through the facility. . . ." Bureau of Community Health Services (BCHS) HEW, Pub. No. 76-16022, Program Guidelines for Project Grants For Family Planning Services under Section 1001, Public Health Service Act at 17 (1976), *reprinted* in Plaintiffs' Brief In Support Of Motion For A Preliminary Injunction, Appendix at A-41 (hereinafter "Plaintiffs' Brief").

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nation, contraceptive supplies, and necessary referrals to other medical facilities when medically indicated.

42 C.F.R. § 59.5 (1970).

While these above-cited regulations alluded to consultation and referral, they did not explicitly address whether § 1008 permitted the dissemination of information to women about abortion in the counseling context. The Department of Health, Education, And Welfare did not explicitly address the issue of the scope of § 1008 until it issued legal opinions through its Office of the General Counsel (OGC).

In an April 1, 1978 OGC legal opinion, defendant reiterated its view that § 1008 "prohibits activities which promote or encourage the use of abortion as a method of family planning." OGC, HEW, Letter to Elsie Sullivan, Assistant for Information and Education, Office for Family Planning, BCHS at 2 (April 1, 1978), *reprinted in* Plaintiffs' Brief, Appendix at A-118. Defendant explicitly stated in this legal opinion that under its view of § 1008, "the provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion . . . are not considered to be proscribed by § 1008." *Id.*

In 1981, defendant issued new Program Guidelines which explicitly adopted the OGC interpretation of § 1008, and stated *inter alia:*

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
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> —Prenatal care and delivery
>
> —Infant care, foster care, or adoption
>
> —Pregnancy termination.

BCHS, United States Department of Health and Human Services, Program Guidelines For Project Grants For Family Planning Services at 13 (1981) (emphasis in original), *reprinted in* Plaintiffs' Brief, Appendix at A-84, 98. At the time of their enactment, these Guidelines represented defendant's most formal and explicit statement of its view that § 1008

permits Title X entities to offer neutral information to women about abortions, as well as referrals upon request to places which perform abortions. The 1981 Guidelines currently remain in effect, and will do so until superceded by the regulations at issue.

The above analysis demonstrates that from the time Congress enacted § 1008 in 1970, defendant consistently interpreted it to permit the neutral dissemination of information about abortion, and the referral upon request to entities which provide abortion. While defendant's interpretation of § 1008 primarily did not take the form of formal regulations and was not always stated using the same language, it is apparent to the Court that defendant until now always has interpreted § 1008 to permit Title X-funded clinics to counsel women about abortion in a nondirective fashion, and to make referrals upon request to abortion providers. The Court must accord "special deference" to this consistently held interpretation. *Associated Dry Goods*, 449 U.S. at 600 n. 17, 101 S.Ct. at 823 n. 17, *citing Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972).

The record is equally apparent that the regulations at issue represent an about-face in defendant's interpretation of § 1008.[5] For example, § 59.8 explicitly

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[5] According to defendant, the regulations in question were enacted in large measure in response to audits of Title X programs performed by the General Accounting Office (GAO) and by the Inspector General of HHS. 53 Fed. Reg. 2923-24 (Feb. 2, 1988). It is true that in 1981, GAO and the Inspector General of HHS conducted separate audits of compliance by Title X agencies with § 1008. The GAO report, with which the Office of the Inspector agreed, "found no indications that any women were advised or encouraged to have abortions" by Title X clinics. Comptroller General, General Accounting

prohibits a Title X-funded clinic from providing any information to women about abortion, including abortion referrals, even though women may request such a referral. Section 59.8(a)(2) is directly contrary to the 1981 Program Guidelines because under it, a woman requesting information on options for management of an unintended pregnancy can no longer receive abortion counseling, but rather *must* be referred to a "list of available providers that promote the welfare of mother and unborn child." 53 Fed. Reg. 2945 (Feb. 8, 1988) (to be codified at 42 C.F.R. § 59.8(a)(2)). Defendant's departure from its contemporaneous and consistent interpretation of § 1008 is an important factor supporting the Court's conclusion that § 1008 does not authorize defendant to enact the regulations at issue.

A Court reviewing whether an agency has exceeded its statutory authority in promulgating regulations can look to subsequent legislation relating to the enabling statute and determine whether it sheds light on the purpose of the original enabling statute. *Consumer Product Safety Commission v. GTE Sylvania,*

Office, Restrictions On Abortion And Lobbying Activities In Family Planning Programs Need Clarification, at ii (1982) (hereinafter "GAO Report"); *reprinted in* Plaintiffs' Brief, Appendix at A-124, 127; *see also* Office of Inspector General, U.S. Department of Health and Human Services, Memorandum Regarding Review of PHS Title X Family Planning Grantees—Audit Control No. 12-33177 at 4 (Nov. 18, 1982), *reprinted in* Plaintiffs' Brief, Appendix at A-168. The GAO Report also found "variations in clinic practices" which it felt were "questionable in light of HHS' interpretation of section 1008." GAO Report at ii. The Report recommended that the "Secretary establish clear operational guidance by incorporating into the Title X program regulations and guidelines HHS' position on the scope of the abortion restriction in section 1008." *Id.* at iv.

447 U.S. 102, 118 n. 13, 100 S.Ct. 2051, 2061 n. 13, 64 L.Ed.2d 766 (1980), *citing Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801-02, 23 L.Ed.2d 371 (1969).[6] Subsequent legislation bearing on Title X after its enactment in 1970 provides helpful insight on Congressional intent and further support for the Court's conclusion that defendant exceeded its statutory authority in enacting the regulations at issue.

Congress has amended and/or reauthorized Title X six times since its passage in 1970. The policy of permitted X-funded entities to disseminate neutral information about abortion, including referrals to abortion providers upon request, has been in effect since virtually the inception of Title X. This means that Congress had at least six opportunities to change this policy but declined to do so. A purpose behind

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[6] Defendant argues in its brief that "subsequent legislative history is decidely unhelpful in ascertaining the intent of legislation adopted by a prior Congress." Defendant's Brief at 29, *citing Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13. The Court agrees that *subsequent legislative history* is not very helpful in determining the intent of Congress when it enacted Title X in 1970. However, the Supreme Court in the above-cited case pointed out that "*subsequent legislation* declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Id.* (emphasis added). It is true that no subsequent legislation interpreting Title X actually *declares* the intent of Congress when it enacted Title X. However, the subsequent legislation relating to Title X certainly bears on the earlier intent of Congress in 1970, and the Court can draw reasonable inferences about the earlier intent of Congress from this subsequent legislation. Thus, while the subsequent legislation bearing on Title X is not entitled to "great weight" because it does not explicitly *declare* the intent of Congress in 1970, it certainly is entitled to some weight.

the reauthorization requirement contained in 42 U.S.C. § 300a(d) is to enable Congress to review the Title X program periodically and implement changes which it deems appropriate. Congressional refusal on repeated occasions to change its policy permitting the neutral dissemination of information about abortion represents a ratification of said policy. In fact, the Committee Reports which accompany the subsequent legislation bearing on Title X consistently reiterate that the program is functioning well and imply that the program should continue in its existing fashion. *See e.g.* Senate Comm. On Labor And Public Welfare, Special Health Revenue Sharing Act of 1975, S.Rep. No. 94-29, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S. Code Cong. & Admin.News 469, 515-20; *see also* Plaintiffs' Brief at 29 n. 32.

The circumstances surrounding the 1978 amendment of Title X shed particular light on the purpose of the original 1970 legislation. In 1978, the following amendment to Title X was introduced in the House of Representatives: ". . . No grant or contract authorized by this title may be made or entered into with an entity which directly or indirectly provides abortion, *abortion counseling*, or an *abortion referral services* (sic.)" 124 Cong.Rec. 37045 (1978) (emphasis added). This proposed amendment would have reversed dramatically the prevailing interpretation of § 1008 prohibiting Title X-funded clinics from disseminating any information about abortion to women, including referral information. However, Congress ultimately rejected this amendment by an almost 2-1 margin. *Id.* at 37048-49. Admittedly, there are some differences between the 1978 amendment and the current regulations at issue. However, these differences are not significant enough to minimize the importance

of the Congressional defeat in 1978 of this amendment which, like the present regulations, would have prevented Title X-funded clinics from providing neutral information to women about abortion, including referrals upon request to abortion providers. Congress sent a clear signal in 1978 that § 1008 does not authorize regulations which prohibit the dissemination of full information to women entering Title X clinics, and the regulations at issue contravene this Congressional admonition.

Overall, then, upon reviewing the totality of the circumstances surrounding Congressional enactment of Title X in general and § 1008 in particular, the Court is convinced by a preponderance of the evidence that plaintiffs have a substantial likelihood of prevailing on the merits because defendant lacks the statutory authority to enact the regulations in question. The regulations mark a clear shift by defendant from prior, consistently held regulatory policy. In addition, they represent a social policy decision of important dimensions affecting a very divisive issue. Decisions of this magnitude, which involve a clear reversal of statutory interpretation and regulatory policy, should be made with clear statutory authority. Neither agencies nor the courts make the law. One of the Court's functions in this case is to review agency actions to ensure that they are authorized by statute. The regulations in question represent an impermissible instance of well-meaning but unelected public servants in the Executive branch amending legislation, or making the law, rather than simply filling in gaps left by Congress.

In reaching this ruling, the Court is mindful of the Supreme Court's statement in *Maher v. Roe*, 432 U.S. 464, 474, 97 S.Ct. 2376, 2382, 53 L.Ed.2d 484

(1977), that *Roe v. Wade* and its progeny do not prevent the Government from "mak[ing] a value judgment favoring childbirth over abortion, and [from] implement[ing] that judgment by the allocation of public funds." However, value judgments which amount to changes in a statute, which are what the new regulations represent, should be made by the elected, accountable Congress and not by the Executive branch.

Accordingly, in holding that defendant lacked statutory authority to enact the regulations at issue, the Court finds that plaintiffs have established a substantial likelihood of success on the merits, which is the first element of the *Lundgrin* test for issuance of a preliminary injunction. The Court need not reach the questions of whether the regulations are arbitrary and capricious or unconstitutional in resolving this first prong of the *Lundgrin* test.

Irreparable Injury

Sound principles of jurisprudence dictate that a court should not decide constitutional questions "unless such adjudication is unavoidable." *Harris v. McRae*, 448 U.S. 297, 307, 100 S.Ct. 2671, 2683, 65 L.Ed.2d 784, *reh'g denied*, 448 U.S. 917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980), *quoting Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944). In the case at bar, defendant has raised substantial questions regarding the nature and extent of the irreparable injury plaintiffs will incur from the implementation of the regulations at issue. As a result, the Court finds that resolution of plaintiffs' constitutional claims is unavoidable in order to resolve the irreparable injury issue.

It is well settled that the violation of constitutional rights, even for short periods, gives rise to irreparable injury. *See e.g. Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). The regulations in question violate a woman's Fifth Amendment liberty interest in choosing whether to have an abortion, her First Amendment right to receive necessary medical information to enable her to vindicate her Fifth Amendment liberty interest, and a physician's First Amendment right to disseminate necessary medical information to patients. Consequently, the Court concludes that these constitutional violations result in irreparable injury which satisfies the second element of the *Lundgrin* test.

Regarding the Fifth Amendment issue, *Roe v. Wade* establishes that any state regulation which impinges upon a woman's fundamental right to have an abortion must be supported by a compelling state interest or else it violates the Fourteenth Amendment. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).[7] This Fifth Amendment liberty interest in having an abortion ". . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426, 103 S.Ct. 2481, 2490, 76 L.Ed.2d 687 (1983), *quoting Roe v. Wade*,

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[7] Unlike *Roe* and its progeny, the present case involves a federal and not a state regulation affecting a woman's right to have an abortion. As a result, the present regulations implicate the Fifth Amendment but not the Fourteenth Amendment. However, the analysis remains the same regardless of whether the case involves the liberty interest embodied in the Fifth Amendment or the Fourteenth Amendment.

410 U.S. at 153, 93 S.Ct. at 727. It logically follows that defendant does not possess "unreviewable authority to decide what information a woman" receives in the context of deciding whether to have an abortion. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 761-62, 106 S.Ct. 2169, 2179, 90 L.Ed.2d 779, 794 (1986), *quoting Akron*, 462 U.S. at 443-44, 103 S.Ct. at 2499-500.

Subsequent Supreme Court decisions have set out the limits of state authority and established that *Roe* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Harris v. McRae*, 448 U.S. at 314, 100 S.Ct. at 2686, *quoting Maher v. Roe*, 432 U.S. at 473-74, 97 S.Ct. at 2382. The regulations in question constitute an "unduly burdensome interference" with a woman's freedom to decide whether to terminate her pregnancy, and therefore violate the Fifth Amendment. They constitute such an interference because they impermissibly restrict the flow of information that a woman must have to make an informed decision whether to have an abortion.

In addition, the regulations intrude into the physician's crucial role in providing the woman with full information necessary to exercise fully her fundamental right to choose to have an abortion. For example, § 59.8 prohibits a practitioner in a Title X-funded clinic from discussing or even mentioning abortion to a woman, even in response to her inquiry, in virtually all circumstances. A woman seeking referral to a qualified abortion provider no longer can depend on the Title X clinic for this information. As a result, a woman no longer will possess full information necessary to vindicate her right to decide to terminate her pregnancy.

Under the regulations, practitioners counseling women on how to manage an unintended pregnancy will not be able to mention abortion, even if they consider such discussion medically necessary, except in rare circumstances. In fact, under the new definition of "family planning," it appears that a Title X clinic must cease virtually all communication with a woman once it determines she is pregnant. *See* 53 Fed. Reg. 2944-45 (Feb. 8, 1988) (to be codified at 42 C.F.R. §§ 59.2, 59.8 (including examples)). The only thing a Title X practitioner can do, or more precisely *must* do, is refer the pregnant woman to a censored list of providers that "promote the welfare of mother and unborn child." 42 C.F.R. § 59.8(a)(2). The bottom line is that a practitioner in a Title X-funded clinic is prevented from saying anything to a pregnant woman about abortion, even if she asks. Thus, even if a woman arguably has the most urgent need for abortion counseling, the new regulations impose a virtual blanket prohibition upon a Title X practitioner's ability to provide such information.

The Supreme Court in *Roe v. Wade* and its progeny has stressed consistently the "central role of the physician" in enabling a woman to vindicate fully her Fifth Amendment right to decide to have an abortion. *Colautti v. Franklin*, 439 U.S. 379, 387, 99 S.Ct. 675, 681, 58 L.Ed.2d 596 (1979); *see also Doe v. Bolton*, 410 U.S. 179, 192, 93 S.Ct. 739, 747, 35 L.Ed.2d 201 (1973); *Thornburgh*, 476 U.S. at 761-62, 106 S.Ct. at 2179, 90 L.Ed.2d at 794; *Akron*, 462 U.S. at 444, 103 S.Ct. at 2500; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66-67, 96 S.Ct. 2831, 2839-40, 49 L.Ed.2d 788 (1976). "Full vindication of a woman's fundamental right necessarily requires that her physician be given the room he

needs to make his best medical judgment." *Akron*, 462 U.S. at 427, 103 S.Ct. at 2491, *quoting Doe v. Bolton*, 410 U.S. 179 at 192, 93 S.Ct. 739 at 747, 39 L.Ed.2d 201.

The regulations impermissibly interfere with the central role of the physician by limiting his discretion and thereby imposing upon him an "undesired and uncomfortable straitjacket" which is constitutionally intolerable. *Thornburgh*, 476 U.S. at 761-62, 106 S.Ct. at 2179, 90 L.Ed.2d at 794, *quoting Danforth*, 428 U.S. at 67, 96 S.Ct. at 2840 n. 8. The regulations prohibit a physician from providing women with neutral and often medically appropriate information about abortion, and also prohibit abortion referrals.

In addition, in some circumstances, such as a consultation with a pregnant woman, the regulations not only prohibit the physician from giving certain information, but actually require the physician to provide specific, censored information to her, even if the information does not comport with the physician's view of the best interests of his patient. *See* 42 C.F.R. § 59.8(a)(2). The Government's interest in regulating abortion "does not permit it to adopt regulations that depart from accepted medical practice." *Akron*, 462 U.S. at 431, 103 S.Ct. at 2493. It appears to the Court that the regulations may force physicians in some circumstances to depart from accepted medical practice in the course of counseling women about family planning.[8] A woman cannot exercise fully

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[8] Indeed, the fact that mainstream medical organizations, such as the American College of Obstetricians and Gynecologists, as well as the Dean of every school of public health in the United States have taken a public position opposing these regulations provides strong indication that the regulations in fact may force physicians to provide counseling in a manner which deviates from accepted medical practices.

her fundamental right to an abortion without benefit of the full breadth of her physician's knowledge and experience. The regulations improperly prevent a treating woman's physician from using his full complement of skills for his patient's benefit.

One way in which defendant attempts to distinguish many of the above-cited cases, such as *Roe*, *Danforth*, *Akron*, and *Thornburgh*, is by pointing out that, unlike the present regulations, these cases involved abortion provisions which contained criminal or quasi-criminal sanctions. However, these cases cannot be distinguished on this basis. For example, it is true that the abortion statutes at issue in *Thornburgh* and *Akron* contained criminal penalties, and also contained quasi-criminal sanctions against physicians. Certainly, the criminal and quasi-criminal nature of the sanctions were relevant to the Court's determination of unconstitutionality. However, in addition, the Supreme Court in both *Thornburgh* and *Akron* struck down the statutes on other "equally decisive" grounds. *Thornburgh*, 476 U.S. at 761-62, 106 S.Ct. at 2179, 90 L.Ed.2d at 794, *quoting Akron*, 462 U.S. at 445, 103 S.Ct. at 2500. The Court in both cases struck down the statutes because they intruded too far "upon the discretion of the pregnant woman's physician" and thereby prevented the woman from exercising her fundamental right to decide to have an abortion. *Id.*

Thus, the Supreme Court in *Thornburgh* and *Akron* was not simply concerned with the fact that the statutes in question contained criminal and quasi-criminal penalties. Rather, the Court expressed concern about statutes which impede the free flow of information between physician and patient. Simply stated, a statute or regulation does not have to contain a criminal or quasi-criminal penalty to consti-

tute an "unduly burdensome interference" with a woman's freedom to decide to have an abortion. Defendant's attempt to distinguish these cases on this basis misses this point.

Defendant relies heavily upon *Maher v. Roe*, 432 *U.S.* 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), and *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), to support its contention that the regulations are constitutional. In *Maher*, the Supreme Court ruled that women are not entitled to Medicaid payments for abortions that are not medically necessary. In *Harris*, the Supreme Court upheld the constitutionality of the Hyde Amendment, Pub.L. 96-123, § 118, 93 Stat. 662, which severely limits the use of federal funds for the actual performance of abortions. Although the Court disagrees with plaintiffs' contention that the cases are inapposite, the cases are nonetheless distinguishable on several grounds.

First, both *Maher* and *Harris* involve government decisions not to pay for the *performance* of abortions. The regulations at issue do not relate to the performance of abortions, but rather impose restrictions on access to information which a woman needs to vindicate her fundamental right to decide to have an abortion. Restricting a woman's only means of access to vital information renders her right to decide to have an abortion largely illusory.

Second, unlike the present regulations, the statutes at issue in *Maher* and *Harris* did not intrude whatsoever upon the crucial role of the physician. As discussed earlier, the Supreme Court in *Roe* and its progeny has emphasized repeatedly the vital role of the physician in enabling a woman to vindicate her fundamental right to decide to have an abortion. The

statutes at issue in *Maher* and *Harris* do not impose any restrictions upon the types of information that a physician may impart upon his patient and, as such, do not offend the consistent line of Supreme Court precedent respecting the physician's role. Conversely, the regulations in the case at bar involve censorship of what a physician can tell his patient, even if she asks. Moreover, the physician is required to make referrals from a censored referral list. The regulations undermine the physician's vital role and therefore are at odds with a clearly established line of precedent from *Roe v. Wade* onward.

Third, defendant cites *Maher* and *Harris* for the proposition that the Government can attach virtually any strings it wishes to funding that it gives out. To state it another way, since the Government in enacting the regulations is regulating only the behavior of entities and individuals using government funds, and is not regulating the behavior of private, non-federally funded entities or individuals, such action is permissible under *Maher* and *Harris*. Although the Government possesses greater latitude in directing use of its funds than it does in regulating private behavior, the assumption that private, non-indigent individuals are not affected is false. Given the structure of Title X programs, the regulations in question in fact will regulate private behavior, and improperly compromise the constitutional rights of non-indigent women.

In addition to serving indigent women, Title X also serves non-indigent women who pay a fee for these services. The proposed regulations apply to any woman who visits a Title X clinic. This means that paying patients will be subject to the same information limitations as indigent women, even though

the Government is not paying for their visit to the clinic. In *Reproductive Health Services v. Webster*, 662 F.Supp. 407 (W.D.Mo.1987), a Court struck down a similar state provision affecting programs which, like Title X programs, served both indigent and non-indigent women. That Court recognized that the proposition in *Maher* and *Harris* that government can attach virtually any strings to funds it gives out is less applicable in federally-funded programs which permit non-indigent individuals to participate. *Id.* at 427. In these circumstances, the non-indigent participants are not dependent on government money, so that the Government has less latitude in regulating their behavior.

Thus, it may be true from *Maher* and *Harris* that indigent people have less power to vindicate their constitutional rights to the extent that they must depend on federal financial support. However, non-indigent people do not depend on such support. Unlike the provisions in *Maher* and *Harris*, the present regulations violate the constitutional rights of non-indigent women seeking counseling from a Title X facility.

Finally, and most importantly, *Maher* and *Harris* are distinguishable because, unlike the present case, the provisions at issue did not implicate the First Amendment. Any government regulation which significantly impairs an individual's First Amendment rights must be supported by a compelling state interest. *Elrod v. Burns*, 427 U.S. 347, 362, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976). The regulations at issue violate a physician's First Amendment right to disseminate necessary medical information, as well as a woman's First Amendment right to receive necessary medical information to enable her to vindicate her Fifth Amendment right to choose whether to have an abortion. As such, the regulations in question vio-

late First Amendment rights while the provisions at issue in *Maher* and *Harris* do not raise such problems.

The First Amendment "above all else . . . means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972); *see also Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530, 536, 100 S.Ct. 2386, 2332, 65 L.Ed.2d 319 (1980). A reviewing court must strictly scrutinize government attempts to restrict expression in this manner. *Id.* Specifically, to withstand constitutional muster under the First Amendment, the regulations must meet the following three pronged test: (1) the regulations must further a substantial governmental interest; (2) the governmental interest must be unrelated to the suppression of free speech; and (3) the incidental restrictions on First Amendment freedoms must be no more than necessary to further the governmental interest. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, *reh'g denied*, 393 U.S. 900, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968).

In the case at bar, the regulations represent content-based censorship which impermissibly impedes a physician's First Amendment freedom to disseminate relevant medical information to his patient. *See Planned Parenthood v. State of Arizona*, 789 F.2d 1348 (9th Cir.), *aff'd sub. nom., Babbitt v. Planned Parenthood of Central & Northern Arizona*, —— U.S. ——, 107 S.Ct. 391, 93 L.Ed.2d 346, *appeal dismissed, Planned Parenthood of Central & Northern Arizona v. Babbitt*, —— U.S. ——, 107 S.Ct. 391, 93 L.Ed.2d 346 (1986). Under the regulations, a physician discussing family planning matters with his pa-

tient is prohibited in virtually all instances from discussing abortion. The physician is not prohibited from discussing alternatives which promote the welfare of unborn children. In fact, when conferring with a pregnant woman, the physician is required under § 59.8(a)(2) to provide specific censored information calculated to promote the welfare of mother and unborn child. In this situation, the restrictions on free speech which the regulations impose are by no means "incidental," but rather are the principal means of achieving the goal of encouraging childbirth over abortion. This government-sponsored censorship of a physician's freedom to impart necessary medical information to his patient is impermissible under the First Amendment.

"Listeners" also have First Amendment rights to receive information. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-23, 48 L.Ed.2d 346 (1975); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 2581-82, 33 L.Ed.2d 683 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965). The First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707, *reh'g denied*, 438 U.S. 907, 98 S.Ct. 3126, 57 L.Ed.2d 1150 (1978). In particular, women have a First Amendment right to receive information about abortion. *Bigelow v. Virginia*, 421 U.S. 809, 821-22, 95 S.Ct. 2222, 2232-33, 44 L.Ed.2d 600 (1975); *Planned Parenthood v. Fitzpatrick*, 401 F. Supp. 554, 577-78 (E.D.Pa.1975) (three-judge court), *aff'd sub. nom., Franklin v. Fitzpatrick*, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed.2d 1205 (1976).

The regulations at issue impermissibly impede a woman's right of access to information about abortion. For example, if a woman at a Title X clinic asks her physician for information about abortion, the physician in most circumstances cannot tell the woman anything other than that the clinic does not believe in abortion and therefore does not talk about it. Indeed, the regulations appear to prohibit the practitioner in a Title X facility from referring the patient to a non-Title X facility which provides mere abortion counseling, because such a referral may "increase the availability or accessibility of abortion for family planning purposes." 42 C.F.R. § 59.10(a). In other words, the regulations effectively prevent many women from obtaining any information about abortion, and therefore violate a woman's First Amendment right to receive information about abortion.

It is one thing for the Government to implement a policy against abortion by refusing to fund abortions. Such action is permissible under both *Maher* and *Harris*. However, the Government in enacting the present regulations is restricting what people hear or read about abortion. This they may not do. *Bigelow v. Virginia*, 421 U.S. 809, 827-28, 95 S.Ct. 2222, 2235-36, 44 L.Ed.2d 600 (1975). The regulations accord preferential treatment to speech favoring childbirth, and this is impermissible under the First Amendment. As such, the regulations do not survive strict scrutiny under the First Amendment.[9]

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[9] There are certain provisions in the regulations which appear more acceptable than others. For example, § 59.10 (a) (1) is a limitation on lobbying by Title X entities which appears acceptable in light of Supreme Court case law. *See Regan v. Taxation With Representation*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). However, § 59.10(a) is a

In delaying the effective date of these regulations, the Court again is very aware that the Government is "not foreclosed from asserting an interest in whether pregnancies end in abortion or childbirth." *Akron*, 462 U.S. at 444 n. 33, 103 S.Ct. at 2500 n. 33. The Government certainly may implement a value judgment favoring childbirth over abortion through the use of federal funds. *Maher*, 432 U.S. at 474, 97 S.Ct. at 2382. However, the Government does not possess unbridled power to do so. The regulations at issue simply go too far, impeding a woman's constitutional right of access to information, and constituting an "unduly burdensome interference" with her fundamental right to decide to have an abortion. The regulations also violate a physician's First Amendment right to disseminate necessary medical information to his patients. Since the constitutional violations are present, plaintiffs have established irreparable injury, thereby satisfying the second element of the *Lundgrin* test.

Balance of Hardship

To satisfy the third element of the *Lundgrin* test, plaintiffs must show that their threatened injury outweighs any whatever damage the proposed injunction may cause defendant. The Court has discussed thoroughly the irreparable injuries that plaintiffs will

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blanket prohibition on activities Title X entities may pursue which raises serious constitutional problems. It is inappropriate for the Court to assume the role of the legislature or administrative agency and selectively choose which provisions of the regulations shall remain in light of this ruling. Consequently, the Court prefers to invalidate the regulations in their entirety and remand the case to defendant so that defendant, rather than the Court, can perform the task of drafting regulations which withstand constitutional scrutiny.

suffer as a result of defendant's violation of the First and Fifth Amendments. The implementation of the regulations will have serious adverse consequences for women, indigent and non-indigent, who use Title X facilities. They will also adversely affect the practitioners at these facilities who will be prevented from providing full information to clients. The only injury which defendant will suffer from the Court's issuance of a preliminary injunction is that the effective date of the regulations will be delayed. Accordingly, the Court finds that the threatened injury to plaintiffs outweighs the damage that delaying the onset date of the regulations will cause defendant, so that plaintiffs have satisfied the third element of the *Lundgrin* test.

Harm to the Public Interest

The final prong of the *Lundgrin* test requires plaintiffs to demonstrate that the preliminary injunction, if issued, would not be adverse to the public interest. Regulations which violate constitutional rights of individuals are harmful to the public interest, and injunctions which delay the implementation of said regulations promote the public interest by preserving adherence to the letter and spirit of the Constitution. In the present case, delaying the enforcement of unconstitutional regulations is not adverse to the public interest, but rather promotes the public interest.

Conclusion

For the reasons stated above, the Court finds that plaintiffs have satisfied the four requirements set out in *Lundgrin v. Claytor* for the issuance of a preliminary injunction. Accordingly, it is

ORDERED that plaintiffs' Motion For Preliminary Injunction is granted. It is

FURTHER ORDERED that the Court incorporates by reference the Preliminary Injunction order which the parties jointly submitted to the Court on February 23, 1988. It is

FURTHER ORDERED that this written Order Granting Plaintiffs' Motion For Preliminary Injunction supercedes the oral bench ruling issued on February 15, 1988. It is

FURTHER ORDERED that the Court reserves ruling on defendant's Motion To Dismiss Or, In the Alternative, For Summary Judgment.

APPENDIX C

UNITED STATES DISTRICT COURT
COLORADO

Civ. A. No. 88-Z-158

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, PLANNED PARENTHOOD ASSOCIATION OF UTAH, BOULDER VALLEY WOMEN'S HEALTH CENTER, MARILYN FOELSKI, M.D., PHILIP FREEDMAN, M.D., and KIRTLY JONES, M.D., PLAINTIFFS

v.

OTIS BOWEN, M.D., individually and in his capacity as Secretary of the United States Department of Health and Human Services, DEFENDANT

June 15, 1988

FINAL ORDER AND JUDGMENT

WEINSHIENK, District Judge.

This case is before the Court on defendant's Motion For Summary Judgment and Plaintiffs' Cross-Motion For Summary Judgment.[1] In an earlier

[1] After the preliminary injunction hearing, the parties stipulated that the issue of whether the Court should grant

Order Granting Plaintiffs' Motion For Preliminary Injunction (hereinafter Preliminary Injunction Order),[2] the Court preliminarily enjoined defendant from putting into effect certain regulations governing the activities of entities receiving funds for family planning services under Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-6a. *See* 53 Fed.Reg. 2944-45 (Feb. 2, 1988) (to be codified at 42 C.F.R. §§ 59.2, 59.7-59.10 (1988)). The present motions and supporting briefs address the issue of whether plaintiffs are entitled to an injunction permanently enjoining defendant from enforcing or applying the above-mentioned regulations.

Summary judgment is appropriate only when there is no genuine issue of material fact so that a reviewing court can resolve the issues presented as a matter of law. *Carey v. United States Postal Service,* 812 F.2d 621, 623 (10th Cir.1987), *citing, Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Upon careful review of the briefs and arguments of the parties and *amici,* this Court concludes that plaintiffs are entitled as a matter of law to a permanent injunction which, by definition, permanently prevents defendant from enforcing or applying the regulations at issue. Accordingly, plaintiffs' Cross Motion For Summary Judgment will be granted, and defendants' Motion For Summary Judgment will be denied.

The legal analysis which the Court must conduct in determining whether to issue a permanent injunc-

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permanent injunctive relief would be resolved through cross-motions for summary judgment.

[2] *Planned Parenthood Federation Of America v. Bowen,* 680 F. Supp. 1454 (D. Colo. 1988).

tion is virtually identical to the analysis involved in the preliminary injunction context. *Sierra Club v. Hennessy*, 695 F.2d 643, 647 (2d Cir.1982); *Sierra Club v. Alexander*, 484 F.Supp. 455 (N.D.N.Y.), *aff'd mem.*, 633 F.2d 206 (2d Cir.1980). That is, in order to grant a permanent injunction, the court must find that (1) plaintiffs have succeeded on the merits; and (2) the "balance of equities" favors the issueance of a permanent injunction. *Alexander*, 484 F. Supp. at 471. Equitable principles considered in determining whether to grant either preliminary or permanent injunctive relief are the same. *Hennessy*, 695 F.2d at 647. Plaintiffs must demonstrate that (1) irreparable injury will occur; (2) the threatened injury to them outweighs whatever damage a permanent injunction may cause defendant; and (3) the granting of permanent injunctive relief is not harmful to the public interest. *Id.* at 647-650; *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F.Supp. 1055, 1057-58 (E.D.Pa.1981); *see also* 7 J. Moore, Moore's Federal Practice § 65.04[1], at 65-30 to 65-70 (1980); *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 95 S.Ct. 2069, 45 L.Ed. 2d 12 (1975); *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1432 n. 13 (10th Cir.1983).

Regarding the success on the merits and irreparable injury issues, the Court has reviewed carefully the briefs and supplemental filings of the parties as well as the *amici* briefs and is convinced that the legal conclusions and reasoning set forth in the Preliminary Injunction Order are correct. *See Planned Parenthood*, 680 F.Supp. at 1467-78. Accordingly, the Court concludes that plaintiffs have established success on the merits as a matter of law. Defendant

lacked statutory authority to enact the regulations in question.

In addition, the Court determines that plaintiffs have demonstrated irreparable injury as a matter of law because the regulations in question are unconstitutional. More specifically, the regulations violate (1) a woman's Fifth Amendment liberty interest in choosing whether to have an abortion, (2) her First Amendment right to receive necessary medical information to enable her to vindicate her Fifth Amendment liberty interest, and (3) a physician's or other treating practitioner's First Amendment right to disseminate necessary medical information to patients.

In support of the conclusions that plaintiffs have demonstrated success on the merits and irreparable injury, the Court adopts and incorporates by reference the reasoning set forth in the Preliminary Injunction Order. *See id.*

Defendant cites the recent Supreme Court case of *Lyng v. International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America* to support its contention that the regulations in question are constitutional. —— U.S. ——, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988).[3] *Lyng* is dis-

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[3] In *Lyng*, the question presented was the constitutionality of a 1981 amendment to the Food Stamp Act, 7 U.S.C. § 2015(d)(3), which states that no household may become eligible to participate in the food stamp program while any of its members is on strike, or receive an increase in the allotment of food stamps it is already receiving because the income of the striking member has decreased. The Supreme Court held *inter alia* that this provision does not violate a striker's First Amendment rights. Defendant cites *Lyng* to support its contention that it is constitutionally permissible for government to impose certain restrictions on funding which may have some effect on First Amendment rights.

tinguishable from the present case. The analytical framework in *Lyng* is qualitatively different from the case at bar. The Supreme Court in *Lyng* employed a rational basis standard of review, which is "typically quite deferential," in upholding the provision at issue. 108 S.Ct. at 1192, 99 L.Ed.2d at 391. On the other hand, the regulations in the present case represent content-based censorship which significantly impairs the First Amendment rights of Title X practitioners and patients, as opposed to merely having some effect on their First Amendment rights. As a result, the Court must analyze these regulations using a more probing strict scrutiny test. *See Elrod v. Burns*, 427 U.S. 347, 362, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976). The regulations do not withstand constitutional muster under this more exacting strict scrutiny test. *See Planned Parenthood*, 680 F. Supp. at 1476-78.

The different analytical framework that the Court must use in the present case reflects the fact that the infringement upon First Amendment rights in the present regulations is qualitatively more severe than the provision at issue in *Lyng*. Unlike the provision in *Lyng*, the regulations in the present case represent viewpoint-based discrimination. In addition, the regulations in the present case intrude upon a woman's fundamental right to decide to have an abortion, while the provision in *Lyng* does not implicate any fundamental right. These differences in the factual scenarios of each case provide another basis for distinguishing *Lyng* from the present case.[4]

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[4] Defendant also cites the recent District Court case of *Mendelsohn v. Meese*, 686 F. Supp. 75 (S.D.N.Y. 1988), to support its contention that the regulations in question are constitutional. In *Mendelsohn v. Meese*, the major issue was

Another recent Supreme Court decision, *Boos v. Barry*, sheds some light on the First Amendment question. —— U.S. ——, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). In *Boos*, the Court invalidated on First Amendment grounds a portion of a District of Columbia statute which prohibited the display of any sign within 500 feet of a foreign embassy if it tends to bring that foreign government into "public odium" or "public disrepute." In so doing, the Court reiterated its longstanding opposition to content-based censorship. Admittedly, *Boos* does not involve the precise issues as the present case. However, the Court's decision in the present case that the regulations violate the First Amendment accords well with the spirit of the Supreme Court's recent pronouncement in *Boos* that government provisions which restrict an individuals ability to freely express certain viewpoints are unconstitutional.

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the constitutionality of the recently enacted Anti-terrorism Act of 1987, 22 U.S.C. §§ 5201-5203 (West Supp. 1988). The Act prohibits certain types of activities when undertaken with the purpose of furthering the interests of the Palestinian Liberation Organization. *See Mendelsohn*, at 77. In denying plaintiffs' motion for preliminary injunctive relief, the Court held *inter alia* that the Act does not violate plaintiffs' First Amendment rights. Defendant cites *Mendelsohn* to support its contention that plaintiffs have no constitutional right to use federal funds to disseminate information about abortion to patients at Title X clinics.

Like *Lyng*, *Mendelsohn* is distinguishable from the case at bar. First of all, it is a District Court case from a different Circuit, so its precedential value is limited to the value of its reasoning. In addition, the bulk of the First Amendment analysis is dicta. *See* op. at 79-81. Most importantly, *Mendelsohn* is distinguishable on its facts. Unlike the case at bar, *Mendelsohn* does not involve a provision which imposes content-based censorship in a Congressionally subsidized program.

Regarding the balance of hardship question, plaintiffs have submitted numerous declarations from practitioners at Title X facilities detailing the catastrophic effect that implementation of the regulations will have upon their ability to serve the entire range of their patients' needs. In fact, there is evidence in the record that the implementation of the regulations will force certain Title X clinics to terminate their Title X programs altogether. For example, Karrie Galloway, Executive Director of Planned Parenthood Association of Utah (PPAU), asserts in her Declaration that PPAU will have to discontinue its Title X program if the regulations at issue take effect. Declaration of Karrie Galloway, Executive Director of Planned Parenthood of Utah, Declarations Accompanying Plaintiffs' Brief In Support Of Motion For Preliminary Injunction.

In addition, in the Preliminary Injunction Order issued earlier, the Court discussed at length the irreparable injuries plaintiffs as well as Title X patients themselves will incur as a result of defendant's violation of the First and Fifth Amendments. *See Planned Parenthood*, 680 F. Supp. at 1473-78. The totality of the hardship that plaintiffs will incur from the implementation of these regulations far outweighs any harm which defendants will suffer from the issuance of a permanent injunction. In fact, the Court fails to see the harm which will inure to defendant from the issuance of a permanent injunction. The Title X program simply will continue to operate in the effective manner that it has since its inception.

Finally, in considering whether a permanent injunction will be harmful to the public interest, the Court again adopts the conclusions and reasoning set forth in the Preliminary Injunction Order. *See*

Planned Parenthood, 680 F. Supp. at 1478. Regulations which violate constitutional rights of individuals and exceed an agency's statutory authority are harmful to the public interest. Injunctions permanently preventing the implementation of such regulations promote the public interest by preserving adherence to the letter and spirit of the Constitution and to the principle that Congress and not agencies make the law. Permanently enjoining the implementation and enforcement of the unconstitutional regulations in the case at bar is not adverse to the public interest, but rather promotes the public interest.

For the foregoing reasons, it is

ORDERED that Motion For Leave To File Brief Amici Curiae Of Senator Gordon J. Humphrey, et al. In Support of Defendant is granted. The Clerk shall file stamp the tendered brief. It is

FURTHER ORDERED that the Motion For Leave To File Memorandum Of Law In Excess Of Fifteen Pages Of *Amici Curiae* American Academy Of Medical Ethics, et al. In Support Of Defendant's Motion For Summary Judgment shall be treated as a motion for leave to file a brief *amici curiae*, and is granted, over objection. The Clerk shall file stamp the tendered brief. It is

FURTHER ORDERED that defendant's Motion For Summary Judgment is denied. It is

FURTHER ORDERED that Plaintiffs' Cross-Motion For Summary Judgment is granted. It is

FURTHER ORDERED that defendant as well as its officers, agents, employees and attorneys are permanently enjoined from enforcing or implementing in any fashion the regulations published at 52 Fed. Reg. 2944-46 (Feb. 2, 1988), including without limi-

tation the regulations appearing at 42 C.F.R. §§ 59.7-59.10, and the related definitions appearing at 42 C.F.R. § 59.2, against the named plaintiffs as well as all other parties named in the Preliminary Injunction filed February 24, 1988. It is

FURTHER ORDERED that plaintiffs' request for leave to file a response to the brief *amici curiae* of Senator Gordon J. Humphrey, et. al., filed March 17, 1988, is moot. It is

FURTHER ORDERED that this Order shall constitute the Final Order and Judgment in this case.

APPENDIX D

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

> Congress shall make no law * * * abridging the freedom of speech * * *.

2. United States Constitution, Amendment V:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

3. Title X of the Public Health Service Act, 42 U.S.C. 300(a):

> The Secretary is authorized to make grants to and enter into contracts * * * to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services * * *.

4. Title X of the Public Health Service Act, 42 U.S.C. 300a-6:

> None of the funds appropriated under this subchapter shall be used in program where abortion is a method of family planning.

5. Amendments of Regulations Governing Grants for Family Planning Services:

53 Fed. Reg. 2944-2946 (1988)

(codified at 42 C.F.R. 59.2, 59.5, 59.7, 59.8, 59.9, 59.10)

For the reasons set forth in the preamble, Subpart A of Part 59, 42 Code of Federal Regulations, is hereby amended as set forth below.

PART 59—[AMENDED]

1. The authority citation for Subpart A of 42 CFR Part 59 is revised to read as follows:

Authority: 42 U.S.C. 300a-4

2. In 42 CFR 59.2, the following definitions are added:

§ 59.2 [Amended]

* * * * *

"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services include preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"Grantee" means the organization to which a grant is awarded under section 1001 of the Act.

* * * * *

"Prenatal care" means medical services provided to a pregnant woman to promote maternal and fetal health.

"Program" and "project" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

* * * * *

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and "Title X project" are used interchangeably and mean the identified program which is approved by the Secretary for support under * * * the Act * * *. Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.5 [**Amended**]

3. In 42 CFR 59.5(a), paragraph (a)(5) is removed and paragraphs (a)(6) through (a)(11) are redesignated as paragraphs (a)(5) through (a)(10) respectively.

4. 42 CFR 59.5(b)(3)(i) is revised to read as follows:

§ 59.5 [**Amended**]

* * * * *

(b) * * *

(3) * * *

(i) achieve community understanding of the objectives of the Title X program.

* * * * *

5. In 42 CFR Part 59, § 59.7 through § 59.13 are redesignated as § 59.11 through § 59.17, respectively, and new § 59.7 through § 59.10 are added to read as follows:

§ 59.7 Standards of compliance with prohibition on abortion

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary that it does not include abortion as a method of family planning. Such assurance must include, as a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a) (1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as

an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a) (2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions. Inclusion

of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and theretofore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method

of family planning. The provision of this information does not constitute abortion counseling or referral.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act, and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or acces-

sibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an

association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this action.

6. In addition to the amendments set forth above, in 42 CFR Part 59 remove the words "project" or "projects" or "project's" and add in their place, the words "Title X project" or "Title X projects" or "Title X project's," respectively, in the following places:

(a) Section 59.2 definition of "low income family";
(b) Section 59.5(a)(1);
(c) Section 59.5(b), introductory text;
(d) Section 59.5(b)(3)(iii);
(e) Section 59.5(b)(4);

(f) Section 59.5(b)(7);
(g) Section 59.5(b)(10);
(h) Section 59.6(a);
(i) Newly redesignated § 59.11(a);
(k) Newly redesignated § 59.11(a)(7);
(l) Newly redesignated § 59.11(b);
(m) Newly redesignated § 59.11(c);
(n) Newly redesignated § 59.12(a), the first time it appears;
(o) Newly redesignated § 59.15;
(p) Newly redesignated § 59.16(a).

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No. 90-890

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

—v.—

PLANNED PARENTHOOD FEDERATION OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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PARTIES TO THE PROCEEDING

None of the corporate respondents has a parent or subsidiary corporation.

STATEMENT

Respondents agree with petitioner that the petition for a writ of certiorari in this case should be held and disposed of in light of this Court's resolution of *Rust v. Sullivan*, cert. granted, Nos. 89-1391 and 89-1392 (May 29, 1990) (argued October 30, 1990).

After the resolution of *Rust*, however, there may remain issues in this case to be addressed. These issues could include the impact on the respondents' and their patients' rights of the conclusion reached by the Tenth Circuit that "government funding, which fuels virtually all 'birth control' clinics in the nation, lures poverty-level women to [Title X] clinics for pregnancy testing, medical advice, and referrals to other health care providers . . . [and that] many of the poorest, most naive and ignorant women—who are the persons targeted by Title X—will rely on [incomplete] information." *Planned Parenthood Federation of America, et al. v. Sullivan*, App. 15a.[1] Another possible issue, also addressed by the Tenth Circuit, is the manner in which section 59.9 (the "separation" requirements) will run afoul of 42 U.S.C 300a-7 (the general nondiscrimination policy applicable to all grants under the Public Health Service Act), particularly in the situations of doctors who are solo practitioners in small rural communities. App 9a-10a. A third possible issue would be the impact of the regulations on the constitutional rights of one of the respondents in this case who operates a library, and on the constitutional rights of that respondent's clients who rely on the library for information.

To allow for the possibility that these, or additional, issues will remain to be addressed in this case, respondents request

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1 "App." refers to the appendix to the petition for a writ of certiorari.

an opportunity after the disposition of *Rust*, pursuant to Rule 15.7, to submit a supplemental brief in response to the petition for certiorari; or in the alternative, request that any disposition of the petition for certiorari, other than its denial, allow respondents to raise these issues, or additional issues, in the subsequent judicial proceedings.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's resolution of *Rust v. Sullivan*. After the resolution of *Rust*, respondents should be allowed to file a supplemental response to the petition, unless the petition is denied, or respondents will have an opportunity to raise possible remaining issues in subsequent judicial proceedings.

Dated: February 6, 1991

Respectfully submitted:

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